

United States

Vol 2058

Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellant and Cross-Appellee,

vs.

TWOHY BROTHERS COMPANY, a Corpora-
tion,

Appellee and Cross-Appellant.

Transcript of Record

Upon Appeal and Cross-Appeal from the District
Court of the United States for the
District of Oregon.

FILED

AUG 18 1937

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Portland Oregon,
For Twohy Brothers Company, Ap-
pellee and Appellant.

In the District Court of the United States for the
District of Oregon.

No. L-10532.

TWOHY BROTHERS COMPANY,
a Corporation,

Plaintiff,

v.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

CITATION.

To Twohy Brothers Company, a corporation, and
to DeLancey C. Smith, Esq., and Messrs. Mc-
Camant, Thompson, King and Wood, its at-
torneys:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit at San Francisco, Cali-
fornia, within 30 days from the date hereof, pur-
suant to an appeal filed in the office of the United
States District Court for the District of Oregon at
Portland, Oregon, wherein Northern Pacific Rail-
way Company, a corporation, is appellant, and
Twohy Brothers Company, a corporation, is ap-
pellee, to show cause, if any, why the judgment
rendered against said appellant as in said appeal
mentioned should not be corrected and why speedy
justice should not be done to the parties in that
behalf.

Witness the Honorable James Alger Fee, judge
of the District Court of the United States for the
District of Oregon, on this 19th day of May, 1937.

JAMES ALGER FEE,

Judge of said Court. [1*]

United States of America,
District of Oregon,
County of Multnomah—ss.

Due service of the within Citation is hereby accepted at Portland, Oregon, this 19th day of May, 1937 by receiving a copy thereof, duly certified to as such by Charles A. Hart of attorneys for Defendant.

W. LAIR THOMPSON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 19, 1937. [2]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States Circuit Court of Appeals for the
Ninth Circuit.

TWOHY BROTHERS COMPANY,
a Corporation,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellee.

CITATION ON APPEAL.

The United States of America to Northern Pacific
Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, in said circuit on the 15th day of June, 1937, pursuant to a petition for appeal filed in the clerk's office of the District Court of the United States for the District of Oregon wherein Twohy Brothers Company is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellee as in the said petition for appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James Alger Fee, District Judge of the United States at Portland within said circuit, this 20th day of May, A. D. 1937.

JAMES ALGER FEE,

United States District Court Judge. [3]

Due Service of the within Citation on Appeal is admitted this 20th day of May 1937.

C. A. HART,
Attorneys for Appellee.

[Endorsed]: Filed May 20, 1937. [4]

Be it remembered, That on the 4th day of February, 1929, there was duly filed in the District Court of the United States for the District of Oregon, a complaint in words and figures as follows, to wit: [5]

In the District Court of the United States for the
District of Oregon,

L-10532.

TWOHY BROTHERS COMPANY,
a Corporation,

Plaintiff.

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

COMPLAINT.

Comes now plaintiff, and for cause of action against defendant, complains and alleges:

I.

That plaintiff is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the state of Oregon, and a citizen and resident of the State of Oregon.

II.

That defendant is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and a citizen and resident of the State of Wisconsin.

III.

That this action is one of a civil nature, is between citizens of different states and the amount in controversy exceeds the sum of Three Thousand and 00/100 (\$3000.00) Dollars, exclusive of interest and costs, to wit: a sum in excess of Five Hundred Thousand Dollars (\$500,000.00). [6]

IV.

That heretofore and on or about the 15th day of October, 1925 plaintiff and defendant entered into a written contract for the construction and completion by plaintiff for defendant of a line of railroad from Oro Fino to Headquarters, in the State of Idaho; said contract contained the following general description of the work to be done (the word Contractor therein used referring to plaintiff herein and the word Company the defendant herein):

“The Contractor agrees to furnish all labor, services and material for, except as may be hereinafter otherwise provided and to construct, complete and finish in the most thorough workmanlike and substantial manner in every respect to the satisfaction of the Chief Engineer of the Company, within the time hereinafter specified, and according to the specifications hereto annexed and made a part of this contract the clearing, grubbing, grading, culverts, bridging, tunnels, tracklaying and ballasting and all other work for which prices are hereinafter named on the branch line of the Railway Company extending from Oro Fino to Headquarters in the State of Idaho.

“The work is to be commenced immediately and the grading, bridging, tunnels and tracklaying are to be completed on or before June 1, 1927, and all work on or before September 1, 1927.”

That said contract also required plaintiff to fully complete said line of railroad for operation, to operate it after completion until the roadbed and track had settled, to maintain the line in good operating condition during that time, and finally, to readjust the track to line and grade, to go over all track bolts and tighten all track nuts, before the line would be accepted, and to operate said line before and after completion until it was turned over to and accepted by the Operating Department of the defendant.

V.

That said line of railroad extends through a rugged [7] and mountainous country, wild and inaccessible and remote from sources of labor and supplies. That the first twenty-six (26) miles of said line of railroad is through the canyon formed by a mountain stream known as Oro Fino Creek, and was at the time plaintiff began construction of said line, almost without roads and extremely difficult of access. That in the winter seasons, there are heavy falls of rain and snow and great accumulations of ice along said canyon. That because of the nature of said country and the length and severity of the winters the work to be done under said contract could only be successfully and economically prosecuted if done under a carefully arranged program, and the work so co-ordinated as to permit the performance of all of the larger items of the work under favorable weather conditions.

VI.

That for the purpose of inducing plaintiff to enter into said contract, defendant furnished to plaintiff certain profiles which defendant represented to plaintiff contained approximate estimates of the materials to be excavated and moved by the plaintiff under said contract, said profiles showing that plaintiff would be called upon to handle approximately one Million Seventy-Eight Thousand and Ninety-Five (1,078,095) cubic yards of material in making cuts, fills and changes of channel of Oro Fino Creek, of which 708,000 cubic yards would

be solid rock, 144,875 cubic yards would be loose rock, and 225,220 cubic yards would be common earth. That relying upon said estimates as approximately correct, plaintiff was induced to make a bid naming prices per cubic yard on the various classes of material to be handled, basing said prices on its ability to handle nearly all of said material during [8] favorable seasons of the year and under favorable weather conditions.

That said profiles were grossly incorrect and misleading for said railroad as defendant required plaintiff to construct it; that in truth and in fact defendant required plaintiff to handle and move in carrying out said contract more than 2,057,575 cubic yards of material of which over 1,164,987 cubic yards were solid rock, 473,965 cubic yards were loose rock, over 149,078 cubic yards were hard pan, over 224,251 cubic yards were a spongy, sticky, conglomerate of boulders, clay and mica, much more expensive and much slower to handle than any of the other classifications, and 43,853 cubic yards were of common earth, or an increase of over ninety (90) per cent.

That because of the increased yardage which defendant required plaintiff to handle in carrying out said contract over and above the yardage that was represented to the plaintiff it would be required to handle, and the insistence of the defendant that said work be completed approximately on the schedule provided in said contract, it became and was necessary for plaintiff to perform a large part

of said work under extremely adverse weather conditions,—rain, snow, ice and slides—which would not have been necessary if the quantities to be handled had been even approximately as represented.

VII.

That in the original plans and profiles, no details were furnished as to the method of construction of the bridges on said line, of which there were fifty (50) over Oro Fino Creek in the first twenty-six (26) miles of said railroad; but it was represented to plaintiff by defendant that said bridges [9] would rest on concrete or rubble masonry pedestals or light concrete piers or rock cribs, and in the call for bids plaintiff was asked to bid on bridges resting on any one of the foregoing types of foundation and no other; and the bids submitted by plaintiff for doing said work were for any one of said types of bridge and no other. The construction of each unit of these various types of foundation could and normally would be performed as one operation, the excavation to be immediately followed by the pouring of the concrete or the filling of the rock cribs in each case above the level of high water which would be encountered at later seasons, and when the bridge crew was ready to place the superstructure, it would have these foundations above high water upon which to work.

That instead of adopting any of said standard methods of construction of said bridges, defendant,

while the work was in progress under said contract, adopted the unusual and expensive plan of resting said bridges on wooden mud sills beneath the bed of said Creek. By this plan, plaintiff was required to make excavations in the rocky bed of said creek, and to smooth and level the base of said excavations so as to make an exactly level surface on which to place said mud sills, which said excavations were many times as expensive to make as the excavations for any of the types of foundations on which plaintiff was asked to and did bid. When the mud sills were placed, plaintiff was required to weight them down with rocks to keep them level, and to protect them for months in the bed of said stream against recurring freshets, and against heaving due to the formation of ice. That when the bridge crews reached each bridge site to do the superstructure work, it was necessary by reason of said peculiar form of foundation, for them to do a [10] considerable part of their work under water. Holes had been bored in said mud sills in which to insert dowels and bolts to attach the up-rights and cross members to the mudsills. These holes had to be located and cleaned out under water, and then the dowels which were attached to the posts had to be driven into the holes. In many cases, it was necessary for plaintiff to build new coffer dams, to try to keep the water out, but it was impossible to keep it out. That a majority of the bridges in said Oro Fino canyon were necessarily constructed in the dead of winter, for the

reasons hereinafter set out, and in such cases the bridge crews were forced to work in and under the icy waters of said creek, which were at said times at flood stage; all of which would have been unnecessary if any of the three types of bridge foundations upon which plaintiff bid had been adopted, and all of which resulted in large extra expense to plaintiff.

VIII.

That in accordance with an option reserved by defendant in said contract defendant directed that a major portion of said bridges be constructed of squared timber from the Pacific Coast, which timber was delivered to plaintiff at its material yard at Oro Fino. That the only practicable method of moving these timbers and other bridge materials to the bridge sites was on the rails as the track was laid, and the plaintiff was so directed to do by defendant. That because of the heavy over-run of yardage, especially in the lower end of said canyon, the track laying and consequently the bridge building program had to be fitted piecemeal into the grading program, to comply with the contract requirements for early completion. As a result, most of the track laying and bridge building were thrown into the dead of [11] winter and were carried on in rain, snow and ice, the track laying and bridge building gangs were compelled to be laid off repeatedly with resultant demoralization of forces, and in many instances it was necessary for plaintiff to drag by team or man power materials for

the bridges through and around uncompleted cuts and for long distances through said narrow canyon; and that by reason thereof, said track laying and bridge building were much more costly to plaintiff than would otherwise have been the case and were greatly delayed.

IX.

That the original plans and profiles submitted by defendant to plaintiff to induce plaintiff to enter into said contract called for 25 changes of the channel of said Oro Fino Creek, involving the excavation of 6800 cubic yards of solid rock, 42,500 cubic yards of loose rock, and 4500 cubic yards of earth. Said excavations were all light and shallow and easy and cheap to handle. In plaintiff's contract it was provided that the excavations for such channel changes should be paid for only as ordinary excavation and no separate price was provided for such excavations, but the same was included in the unit prices for excavation of various classes of material for the whole job.

That during the progress of the work, defendant increased the number of channel changes to be made by plaintiff by adding thirty-eight (38) new changes. By reason of said additional channel changes and the errors in said profiles, plaintiff was required to excavate for all of the channel changes 10,000 cubic yards of said spongy, sticky conglomerate of boulders, clay and mica, 68,184 cubic yards of solid rock, 89,879 cubic yards of loose rock, 3,886 cubic yards of hardpan, and 2,755 cubic yards of

earth, or an increase of over 223%. In addition, [12] many of said additional channel changes were wholly unlike the original twenty-five provided for in said contract, in this: that instead of requiring light and cheap excavations and calling for shallow channels, said new channel changes were in narrow and steep parts of the canyon and required deep cuts in solid rock and in swiftly running water, and were many times more expensive per cubic yard to handle than any of the 25 channel changes provided for in the original profiles.

That because of the delay to plaintiff's work caused by the huge over-run of yardage generally on the job, as previously alleged, the over-run of yardage on the channel changes, and the holding back of other work by the necessity for completing said difficult additional channel changes, a large part of the work of channel changing was thrown into the winter and was performed under winter conditions at greatly increased expense over what normally would have been encountered; and the whole of the work done under plaintiff's contract was hindered, delayed and made more expensive thereby.

X.

That said contract contained, among other provisions the following:

(The word "Company" refers to defendant.)

"The Company reserves the right at any time to change in whole or in part, as it may seem expedient, the line and grade of the railroad

or the amount of work embraced in this contract, and any change of the line or grade or bridges shall not affect the prices herein stated; nor shall any bill for 'extras' or other charge or claim be made by reason thereof, or of any difference occasioned by such change in the quantity, location or nature of the work to be performed. But if the chief engineer shall deem the change to have materially [13] affected the cost of doing the work, he shall determine the price to be paid, either above or below as the case may be, the prices herein provided, so as to do substantial justice between the parties."

XI.

That in order to perform said contract, plaintiff assembled forces and equipment to do said job expeditiously and economically, and laid out its plan of action upon which it commenced and would have prosecuted the work to completion well within the time limit specified in the contract without having to do much of the difficult work during the winter weather; but that because of said large increases in the amount of work to be done, especially the large increase in the yardage of material to be handled, the additional channel changes heretofore described, and the said changes in the plans for the bridges, the necessity thus created for performing a large part of the work in the dead of winter, all had the result of seriously interfering with and obstructing plaintiff's plan of operation, disorganizing its forces, and making it necessary to

perform a considerable part of said work piecemeal instead of performing the whole job as one continuous, connected operation.

XII.

That by reason of the matters and things hereinbefore set out, the cost of doing said work of constructing said line of railroad was materially affected and increased by more than Three Hundred Twenty-Six Thousand Seven Hundred Eighty-five (\$326,785.00) Dollars. [Order May 21, 1936. G. H. M.]

XIII.

That plaintiff, during the progress of and at the conclusion of the job, brought to the attention of the Chief Engineer of the defendant said changes and increases and their effect upon the cost of the work as heretofore alleged, and demanded additional compensation therefor over and above the unit prices provided in the contract, in order to do substantial justice between the parties.

XIV.

That said Chief Engineer entertained said claim and determined that said changes and increases had materially affected the cost of doing said work but determined that the additional price to be paid therefor was only the sum of \$80,000.00 less the sum of \$20,000.00 made up of disputed bills submitted by defendant to plaintiff for car rental and demurrage; that said sum of \$80,000.00 with or without said \$20,000.00 deduction is and was wholly

insufficient to do substantial justice between the parties; that the cost to plaintiff of doing the work under said contract was increased by said changes and increases by more than the sum of \$150,000.00 as heretofore alleged, and that the price to be paid plaintiff over and above the prices named in the contract so as to do substantial justice between the parties was and is the sum of \$326,785.00. [Order May 21, 1936. G. H. M.]

XV.

That thereafter, said Chief Engineer of the defendant railroad company arbitrarily refused to give to plaintiff as part of the final estimate provided for in said contract even said allowance of \$80,000.00 on said claims, or any part thereof, unless plaintiff would agree to relinquish its right to certain other payments due it under said contract, which plaintiff refused to do, and ever since said Chief Engineer has refused and he now refuses to make said or any allowance. That said refusal of defendant has been and is made solely to coerce plaintiff into abandoning [15] other rights given it by said contract and relinquishing other sums of money due it under said contract.

XVI.

That it was provided in said contract, among other things, as follows:

“When the ballasting is completed, the track shall be in perfect line, surface and gauge, and shall be so maintained by the contractor until it is accepted by the Company for operation.

This contemplates a second adjustment of the track to line and grade, after it has settled under traffic."

"The line will not be accepted until it is fully completed."

"After the track has been in service and before acceptance of same, all bolts must be gone over again and have nuts turned up tight."

"Contractor shall handle with his own work train, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service, and in the service of other contractors. The specified contract price per car mile to include all necessary switching and spotting, and apply to empty car movement from point of origin of the empty car to the loading site, and loaded car return to the operated lines of the Company."

XVII.

That for such handling of cars there was provided (under Item 72 of the Price for work mentioned in said contract) the following: [16]

"(72) Handling, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service of other contractors, to include all necessary switching and spotting, and apply to empty car movement from point of origin of the empty car to the loading site,

and loaded car return to the operated lines of the Company, per car mile,—\$1.00.”

XVIII.

Prior to and at the time of the execution of said contract it was apparent that considerable commercial business would be offered for transportation on said line of railroad prior to the time same was taken over by the defendant for operation; that in submitting its bid and making said contract with defendant plaintiff named prices for the handling of said commercial business which would result in a large profit to plaintiff on said item and relied upon the profit so to be received in naming prices on other items in its bid and in said contract and would have demanded higher prices on said other items except for the profit it anticipated from handling said commercial business; that plaintiff made preparations to handle said business as it might develop and was equipped to handle the same and did in fact handle a part thereof.

XIX.

That during the early summer of 1927 defendant, in violation of its contract with plaintiff, and over the protest of the plaintiff, did refuse to permit plaintiff to handle said business as it developed, and on July 17, 1927, forcibly took possession of the lower 29 miles of said railroad on which large offerings of commercial business were being made, and subsequently [17] of other portions of said

line, and did proceed to handle said commercial business itself, and did refuse to make any payments to plaintiff therefor.

XX.

That because of the matters and things hereinbefore alleged, defendant permitted plaintiff without objection to extend the time of completion of said railroad to January 1, 1928 at which time plaintiff had fully completed said railroad and the same was accepted by the defendant and turned over to defendant's Operating Department on said date.

XXI.

That between July 17, 1927 and January 1, 1928, defendant carried over said line commercial business to the extent of 7,874 cars a total of 443,184.7 car miles, all of which would have been handled by plaintiff except for defendant's forcible taking possession of said part of said railroad.

That plaintiff would have been required to expend for the reasonable expense of handling said commercial business an amount not exceeding One Hundred Fourteen Thousand Dollars (\$114,000.00) and was entitled to receive, under the terms of its contract with plaintiff, at the rate of One Dollar (\$1.00) per car mile for said business, the sum of Four Hundred Forty-Three Thousand One Hundred Eighty-Four and 70/100 (\$443,184.70) Dollars, which would have left a net profit to plaintiff of Three Hundred Twenty-Nine Thousand One Hundred Eighty-Four and 70/100 (\$329,184.70)

Dollars, all of which sum is now due and owing to plaintiff by defendant under said contract; and that no part thereof has ever been paid, although frequently demanded. That the Chief Engineer of defendant has at all times refused to include any sum of money whatever on this item, either in the monthly estimates or in a final estimate. [18]

XXII.

It was further provided in said contract between plaintiff and defendant in part as follows:

“Timber and piles furnished by the Railroad Company for permanent or temporary work will be delivered by the Railroad Company at their material yard, and the contractor will be paid for hauling to the bridge site.”

It is further provided, under Item 38 of the Schedule of Prices for Work, as follows:

“(38) Hauling timber furnished by the Company, per 1000 F. B. M. per mile
\$0.85 (By the expression F. B. M. the parties meant Feet Board measure).

XXIII.

In executing said contract in accordance with its terms, plaintiff hauled timber furnished by the Company in the amount of 3,331,683 board feet a total distance of 65,331.55 miles per 1000 F. B. M. for which at said contract price of \$0.85, it should have been paid the sum of \$55,531.82. That of said amount so payable to plaintiff under said contract, defendant has paid only the sum of \$20,410.52, leaving a balance due and owing plaintiff from

defendant on this item of Thirty-Five Thousand One Hundred Twenty-One and 30/100 (\$35,121.30) Dollars, no part of which sum has ever been paid, although frequently demanded.

XXIV.

That said contract provided, by Item 37 of the Schedule of Prices, as follows:

“(37) Hauling piles furnished by the Company per lineal foot per mile\$0.02.” [19]

XXV.

That this plaintiff, in executing said contract in accordance with its terms, hauled 19,158 lineal feet of piling furnished by the Company a total of 248,282.67 lineal foot miles, for which it was provided in the contract it should have been paid the sum of Four Thousand Nine Hundred Sixty-Five and 65/100 (\$4,965.65) Dollars which sum it has frequently demanded from defendant on this item, but that defendant has paid no part thereof, except \$660.90, leaving a balance due and owing to plaintiff from defendant on this item of Four Thousand Three Hundred and Five and 16/100 (\$4,305.16) Dollars.

XXVI.

That said contract also provided that plaintiff should be paid for hauling metal fastenings at the rate of \$0.65 per ton per mile.

That in executing said contract in accordance with its terms, plaintiff hauled metal fastenings to the extent of 3,861.68 ton miles, for which said

contract provided it was to be paid at said rate of \$0.65 per ton mile, making a total of Two Thousand, Five Hundred Fifteen and 29/100 (\$2,515.29) Dollars.

That defendant has not paid any part thereof except the sum of \$1,215.51 leaving a balance still due and owing from defendant to plaintiff on this item of One Thousand, Two Hundred Ninety-Nine and 78/100 (\$1,299.78) Dollars, which sum though frequently demanded, has never been paid.

XXVII.

That in addition to the matters and things hereinbefore set out there is still due and owing plaintiff from defendant for work done under said contract according to defendant's own [20] figures the sum of \$26,938.03, no part of which has ever been paid, though frequently demanded by plaintiff. That said sum is made up of balances due on numerous items of work, and it is impossible to allocate any part of same to any particular item or items of the work done.

XXVIII.

It is further provided in said contract, in part, as follows:

“When in the opinion of the Chief Engineer this contract shall have been performed, he shall so certify in writing, and give a final estimate and statement of the balance unpaid; and the Company within thirty (30) days thereafter will pay the full balance.”

XXIX.

That said contract was fully performed by plaintiff, and said line of railroad completed prior to January 1, 1928; that the Chief Engineer of defendant accepted said railroad line as complete and caused plaintiff to turn said railroad over to the Operating Department of the defendant on January 1, 1928; but that said Chief Engineer has ever since arbitrarily neglected and refused to give a final estimate and statement of the balance due plaintiff and unpaid, and has arbitrarily refused and continues to refuse to make a final estimate showing any sum of money whatever due from defendant to plaintiff for any of the materials and things heretofore referred to in this complaint; that the sums of money due plaintiff from defendant, as hereinbefore alleged, were due not later than thirty (30) days after January 1, 1928. [21]

Wherefore, plaintiff demands judgment against defendant for the sum of Six Hundred Ninety-One Thousand Eight Hundred Seventy-four and 66/100 (\$691,874.66) Dollars, with interest thereon at the rate of six per cent per annum from February 1, 1928, until paid, and for plaintiff's costs and disbursements in this action.

[Order May 21, 1936. G. H. M.]

GARRECHT & TWOHY,

WILSON, REILLY & ISAACS,

Attorneys for Plaintiff.

United States of America
District of Oregon—ss.
State of Oregon
County of Multnomah—ss.

James F. Twohy, being first duly sworn, deposes and says: that he is Secretary of Twohy Brothers Company, the corporation plaintiff within named; that he has read the foregoing complaint, knows the contents thereof, and the same is true.

JAMES F. TWOHY.

Subscribed and sworn to before me this 2nd day of February, 1929.

[Seal]

JOHN F. REILLY,
Notary Public for Oregon.

My Commission Expires: Dec. 5, 1930.

[Endorsed]: Filed February 4, 1929. [22]

And Afterwards, to wit, on the 4th day of February, 1929, there was issued out of said Court, a summons which with the return of service thereon, is in words and figures, as follows, to wit: [23]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon—ss:

I hereby certify and return that I served the annexed Summons & Complaint on the therein-named Northern Pacific Ry. Co., a corporation, Room 531 American Bank Bldg., by handing to and leaving a true and correct copy thereof with A. D. Charlton, Gen. Passenger Agent of said Co. per-

sonally at Portland in said District on the 4th day of Feb., A. D. 1929.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By JOE VOGELSANG,

Deputy. [24]

[Title of Court and Cause.]

SUMMONS.

The President of the United States of America
To Northern Pacific Railway Company, a corporation,
the above named defendant—Greeting:

You are hereby commanded to be and appear in the above-entitled Court, holden at the city of Portland, in said District, and answer the complaint filed against you in the above-entitled action, within 10 days from the date of the service of this Summons upon you, if served within the county of Multnomah, in said District, or if served within any other county of said District, then within thirty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for the sum of Five Hundred Forty Six Thousand Eight Hundred Forty-eight and 97/100 Dollars (\$546,-848.97) with interest thereon at the rate of six per cent per annum from February 1, 1928, until paid, and for plaintiff's costs and disbursements in this action.

And this is to command you, the Marshal of said District, or your Deputy, to make due service and return of this Summons.

Hereof fail not.

Witness the Honorable Robert S. Bean and the Honorable John H. McNary, Judges of said Court, and the Seal thereof affixed at Portland, in said District, this 4th day of February, 1929.

G. H. MARSH, Clerk.

By F. L. BUCK,

Chief Deputy Clerk.

[Endorsed]: Returned and filed February 6, 1929.

[25]

And afterwards, to wit, on the 30th day of March, 1929, there was duly filed in said Court, an answer in words and figures as follows, to wit: [26]

[Title of Court and Cause.]

ANSWER.

Now comes defendant and answers the complaint herein as follows:

I.

Defendant admits that plaintiff is an Oregon corporation as stated in paragraph I of the complaint.

II.

Defendant admits that defendant is a Wisconsin corporation as stated in paragraph II of the complaint.

III.

Defendant admits that this action is one of a civil nature between citizens of different states, and that the amount in dispute exceeds the sum of \$3,000.00, exclusive of interest and costs.

IV.

Defendant admits that on October 15, 1925, a contract was entered into between plaintiff and defendant for the construction of a line of railroad from Orofino to Headquarters, in the State of Idaho, and admits that the work to be done was [27] described generally as alleged in paragraph IV of the complaint. A true copy of the contract so entered into between the parties is hereto annexed, marked Exhibit A. Except as herein admitted, defendant denies each and every allegation of paragraph IV of the complaint.

V.

Defendant admits that portions of the railroad to be constructed were located in mountainous country, accessible in part only by roads or highways. Defendant also admits that the first twenty-six miles of the line were located along the stream known as Orofino Creek, and that in winter seasons in this locality there are heavy falls of snow and rain. Except as so admitted, defendant denies each and every allegation of paragraph V of the complaint.

VI.

Defendant denies each and every allegation of paragraph VI of the complaint. Defendant made no representations to plaintiff concerning the amount of yardage of materials to be excavated in the construction work, but, on the contrary, furnished to plaintiff and to other contractors desiring to bid for the construction work, such information as defendant had been able to obtain as the result

of location surveys and preliminary examinations of the route of the proposed line. The yardage figures included in the data furnished to plaintiff and other bidders were not designed to show how much material the contractor would be called upon to excavate. Profiles and maps were furnished to plaintiff and other bidders to show the location of the line and the cuts which were to be made, and the yardage figures shown were based upon an arbitrary slope line, and, as plaintiff well knew, the slope [28] line for each cut and the amount of yardage to be removed therefrom could only be determined when the cuts were actually made and the exact character of the material therein ascertained. Plaintiff in making its bid and in contracting with defendant did not act in reliance upon any representation as to the amount of yardage, but undertook to remove, for compensation based upon a specified price per yard, such amounts of material as would be necessary to complete the cuts with slopes such that slides of material would be avoided.

Defendant admits that the amount of yardage actually removed in the construction work was substantially greater than that shown in the preliminary information furnished plaintiff and other bidders, but defendant alleges that plaintiff entered into the contract with defendant solely on its own knowledge and on information derived from others than the defendant, respecting the nature and formation of the country in which the work was to be done, and the character, quantities and location of the material required to be removed or to be used in

the roadbed of the proposed line of railroad; and the increase of yardage described in the complaint imposed no additional burden on plaintiff not contemplated by the contract.

VII.

Defendant denies each and every allegation of paragraph VII of the complaint and alleges the fact to be that plaintiff was specifically notified prior to the execution of the contract that the type of bridges and method of construction had not then been determined, but that in many instances temporary construction would be required in order to [29] expedite tracklaying; and there was furnished to plaintiff and other bidders, prior to the execution of the contract, defendant's standard plans for bridge construction, in general accordance with which said bridges were in fact constructed.

Thereafter, and following conferences between defendant's engineers and representatives of plaintiff, a definite plan for bridge construction was agreed upon and plaintiff was directed by defendant to proceed at once during the summer season of 1926 to carry out the program agreed upon. Notwithstanding such agreement and such direction, plaintiff failed to organize its work and permitted the entire summer season of 1926 to pass without prosecuting the bridge work continuously, and such difficulties as plaintiff encountered in the performance of the bridge work resulted from its failure to

proceed promptly and expeditiously during the low water period in the summer season of 1926.

VIII.

Defendant denies that all of the bridges on said railroad were required to be constructed of squared timber from the Pacific Coast, delivered to plaintiff at its material yard at Orofino, and alleges the fact to be that a considerable number of said bridges were constructed, with the consent of defendant, out of round timber procured locally. Defendant further denies that plaintiff was necessarily required to delay moving bridge timbers and materials to the bridge sites until track was laid up to such bridge sites, and alleges the fact to be that under the terms of the contract plaintiff was required to construct the bridges ahead of the track in all cases, subject only to the limitation that plaintiff would be permitted to haul bridge materials by team, and to charge defendant the team haul rate therefor for a maximum distance of four miles, except by special permission of the Chief Engineer of defendant.

Except as herein admitted, defendant denies each and every allegation of paragraph VIII of the complaint and alleges the fact to be that at or near the time of commencement of the bridge work, plaintiff and defendant jointly developed and adopted a program for bridge construction which provided for the use of local timber to a substantial extent, and which contemplated the use of the newly laid track for rail haul of materials as far as might be found practicable. Defendant further alleges that regard-

less of the amount of yardage to be moved, it was necessary to fit the tracklaying program and the bridge building program piecemeal into the grading program and to do a substantial amount of the bridge construction work in the winter season.

IX.

Defendant admits that as the work progressed changes were made by defendant in accordance with its reserved right, which reduced the number of crossings of Orofino Creek and correspondingly increased the number of changes of the channel of the stream. Except as so admitted, defendant denies each and every allegation of paragraph IX of the complaint and alleges the fact to be that such changes of line and changes of channel of the stream did not impose any additional burden on plaintiff not contemplated by the contract, but, on the contrary, in large part lessened the difficulties of the construction work because of the substantial reduction in the [30] number of bridges to be constructed.

X.

Defendant admits the allegations of paragraph X of the complaint with reference to the reserved right of defendant to make changes in the work.

XI.

Defendant denies that plaintiff assembled forces and equipment to do the work contracted for expeditiously and economically, and denies that the increases of yardage over the amounts shown in the

data originally submitted to plaintiff, or the increase in channel changes or in the changes in the plans for bridges, in any manner operated to prevent the expeditious and economical conduct of the work; and defendant denies each and every allegation of paragraph XI of the complaint.

XII.

Defendant denies each and every allegation of paragraph XII of the complaint.

XIII.

Defendant denies each and every allegation of paragraph XIII of the complaint. Plaintiff made no demand at any time for an increase in the unit prices based upon changes supposed to have materially affected the cost of doing the work.

XIV.

Defendant denies each and every allegation of paragraph XIV of the complaint. At no time did the Chief Engineer of defendant determine that any changes made by defendant under its reserved right had materially affected the cost of doing the work, nor did said Chief Engineer at any time de- [31] termine that plaintiff was entitled to \$80,000.00 additional compensation by reason of any such changes. Defendant alleges the fact to be that several months after all work had ceased and after defendant had submitted to plaintiff a final estimate showing the balance finally due to plaintiff, there were negotiations between plaintiff and defendant for a complete settlement between them. Plaintiff

had theretofore made claims for additional compensation and defendant had declined to entertain said claims. During the negotiations which followed and in the month of June, 1928, defendant offered to pay plaintiff the sum of \$80,000.00, less \$20,000.00 owing to defendant for car rental and demurrage, in full settlement of all matters in dispute between plaintiff and defendant. Said offer was made to an officer of plaintiff who received same and considered it solely as an offer of complete settlement, and plaintiff well knew and understood that the offer was a proposal for a compromise settlement and was not an allowance proposed to be made because of supposed changes in the quantity, location or nature of the work contracted for.

XV.

Defendant denies each and every allegation of paragraph XV of the complaint and alleges the facts to be as stated in the defendant's answer to paragraph XIV of the complaint.

XVI.

Defendant admits that the specifications attached to and made a part of the contract between the parties included the clause quoted in paragraph XVI of the complaint.

XVII.

Defendant admits that the schedule of prices attached [32] to and made a part of the contract between the parties included the item quoted in paragraph XVII of the complaint.

XVIII.

Defendant denies each and every allegation of paragraph XVIII of the complaint. In submitting a bid and in making said contract with the defendant, plaintiff well knew that no substantial volume of commercial business would be turned over to it for handling in its work trains. Plaintiff thoroughly understood that defendant did not contemplate engaging in the transportation of any substantial volume of commercial business after the time of tracklaying and before final completion of the railroad, at any transportation rate which shippers could afford to pay, with any purpose of calling upon plaintiff to haul the cars transporting such commercial business at a rate of \$1.00 per car mile. On the contrary, plaintiff in submitting its bid and in making the contract with defendant well knew that the commercial business which it might be called upon to transport included only occasional cars which the defendant might desire to have transported and which the plaintiff would be required to haul in its work trains.

XIX.

Defendant admits that in the early summer of 1927 defendant engaged in the transportation of logs upon the first twenty-nine miles of the railroad under construction; and defendant admits that it refused to make any payments to plaintiff because of such transportation. Except as so admitted, defendant denies each and every allegation of paragraph XIX of the complaint and alleges the fact

to be that on July 16, 1927, defendant, pursuant to its reserved right [33] under the contract with plaintiff, relieved plaintiff of its obligation to perform further work upon the first twenty-nine miles of said railroad, and thereafter, pursuant to an agreement with an owner of timber, engaged in the transportation of logs on said portion of said railroad.

XX.

Defendant denies each and every allegation of of paragraph XX of the complaint and alleges the fact to be that plaintiff was unable to complete and did not complete that part of the railroad not taken over on January 16, 1927, until October 25, 1927, on which date plaintiff discontinued all work under the contract.

XXI.

Defendant admits that between July 16, 1927, and January 1, 1928, it engaged in the business of transporting carload shipments of logs on the first twenty-nine miles of said railroad. Except as so admitted, defendant denies each and every allegation of paragraph XXI of the complaint and alleges the fact to be that none of said shipments would have been accepted for transportation by defendant, and none would have been hauled by plaintiff for defendant as commercial business at the rate of \$1.00 per car mile, if defendant had not relieved plaintiff of its obligation to complete the first twenty-nine miles of said railroad, and if plaintiff had continued in charge thereof after July 16, 1927, and until the time of final completion.

XXII.

Defendant admits that the specifications and schedule of prices forming a part of the contract between plaintiff and defendant included the items quoted in paragraph XXII of [34] complaint.

XXIII.

Defendant admits that it has paid plaintiff the sum of \$20,410.52 as compensation for the hauling of timber under the provisions of the contract quoted in paragraph XXII of the complaint. Except as so admitted, defendant denies each and every allegation of paragraph XXIII of the complaint and alleges the fact to be that under the terms and provisions of the contract defendant agreed to pay plaintiff the schedule price of 85 cents per thousand F. B. M. per mile referred to in paragraph XXIII of the complaint for timber transported by team haul only, a maximum distance of four miles. Defendant further alleges that under the terms of the contract plaintiff agreed to construct all bridges ahead of the track and this obligated plaintiff to haul in timbers and other bridge materials by team from the end of track to the bridge site, subject to the limitation that the maximum team haul should be four miles.

At or near the time of commencement of the bridge work plaintiff and defendant jointly developed and adopted a plan for the bridge work, which plan provided for the use of a substantial amount of round timber procured locally but which also required considerable squared timber from the

Pacific Coast, which squared timber and other bridge materials were required to be transported from the material yard of plaintiff at Orofino, to the end of track, by rail haul; and the Chief Engineer of defendant then determined, under the authority given him by the contract, and with the assent of plaintiff, that the compensation to be paid for such rail haul would be that provided for rail by item 72 of the schedule of prices, to-wit, [35] \$1.00 per car mile. Defendant alleges that it has allowed plaintiff in the current engineers' estimates full compensation at said rates for all timber and other bridge material hauled and is not obligated to plaintiff in any additional sum because of said transportation.

XXIV.

Defendant admits that the schedule of prices forming a part of the contract between plaintiff and defendant included the item quoted in paragraph XXIV of the complaint, providing the rate of 2 cents per lineal foot per mile for hauling piles.

XXV.

Defendant admits that it has paid plaintiff the sum of \$660.90 as compensation for hauling piles under the provisions of the contract quoted in paragraph XXIV of the complaint. Except as so admitted, defendant denies each and every allegation of paragraph XXV of the complaint and alleges the fact to be that under the terms and provisions of the contract defendant agreed to pay plaintiff the schedule price of 2 cents per lineal foot per

mile referred to in paragraph XXV of the complaint for piles transported by team haul only, a maximum distance of four miles. Defendant further alleges that under the terms of the contract plaintiff agreed to construct all bridges ahead of the track and this obligated plaintiff to haul in timbers and other bridge materials by team from the end of track to the bridge site, subject to the limitation that the maximum team haul should be four miles.

At or near the time of commencement of the bridge [36] work plaintiff and defendant jointly developed and adopted a plan for the bridge work, which plan provided for the use of a substantial amount of round timber procured locally but which also required considerable squared timber from the Pacific Coast, which squared timber and other bridge materials were required to be transported from the material yard of plaintiff at Orofino, to the end of track, by rail haul; and the Chief Engineer of defendant then determined, under the authority given him by the contract, and with the assent of plaintiff, that the compensation to be paid for such rail haul would be that provided for rail by item 72 of the schedule of prices, to-wit, \$1.00 per car mile. Defendant alleges that it has allowed plaintiff in the current engineers' estimates full compensation at said rates for all timber and other bridge material hauled and is not obligated to plaintiff in any additional sum because of said transportation.

XXVI.

Defendant admits that the contract between plaintiff and defendant provided a price of 65 cents per ton per mile for hauling metal fastenings, and that defendant has paid plaintiff the sum of \$1,215.51 as compensation for hauling metal fastenings pursuant to the contract. Except as so admitted, defendant denies each and every allegation of paragraph XXVI of the complaint and alleges the fact to be that under the terms and provisions of the contract defendant agreed to pay plaintiff the schedule price of 65 cents per ton per mile referred to in paragraph XXVI of the complaint for metal fastenings transported by team haul only, a maximum distance of four miles. Defendant further alleges that under [37] the terms of the contract plaintiff agreed to construct all bridges ahead of the track and this obligated plaintiff to haul in timbers and other bridge materials by team from the end of track to the bridge site, subject to the limitation that the maximum team haul should be four miles.

At or near the time of commencement of the bridge work plaintiff and defendant jointly developed and adopted a plan for the bridge work, which plan provided for the use of a substantial amount of round timber procured locally but which also required considerable squared timber from the Pacific Coast, which squared timber and other bridge materials were required to be transported from the material yard of plaintiff at Orofino, to the end of track, by rail haul; and the Chief Engineer of defendant then determined, under the au-

thority given him by the contract, and with the assent of plaintiff, that the compensation to be paid for such rail haul would be that provided for rail by item 72 of the schedule of prices, to-wit, \$1.00 per car mile. Defendant alleges that it has allowed plaintiff in the current engineers' estimates full compensation at said rates for all timber and other bridge material hauled and is not obligated to plaintiff in any additional sum because of said transportation.

XXVII.

Defendant denies that there is still due and owing plaintiff the sum of \$26,938.03, as alleged in paragraph XXVII of the complaint, and alleges the fact to be that by reason of the many items of debit and credit to the account of plaintiff as a result of payments due on the one hand and advances [38] and allowances made by defendant on the other, it is impossible to determine without an accounting of all matters between plaintiff and defendant what, if any, sum now remains due plaintiff.

XXVIII.

Defendant admits that the contract between plaintiff and defendant included a provision for a final estimate quoted in paragraph XXVIII of the complaint.

XXIX.

Defendant denies each and every allegation of paragraph XXIX of the complaint and alleges the fact to be that a final estimate was duly and promptly prepared by the engineers of defendant but at the specific request of plaintiff was not

signed by the Chief Engineer of defendant nor formally tendered to plaintiff. At the conclusion of the work under said contract plaintiff made claim upon defendant for additional compensation and requested defendant to withhold its final estimate and to reserve final determination of the amount ultimately due plaintiff. For many months prior to the completion of the work defendant, at the request of plaintiff and to relieve the urgent necessities of plaintiff, had advanced large sums to plaintiff, and at the time of the completion of the work there was due from plaintiff to defendant by reason of such advances a sum substantially equal to the balance of compensation shown to be due plaintiff by the estimates of the engineers of defendant.

For its further and separate answer and its cross complaint in equity herein, defendant alleges: [39]

I.

Plaintiff is a corporation organized under the laws of the State of Oregon, and defendant is a corporation organized under the laws of the State of Wisconsin. This proceeding is one of a civil nature between citizens of different states, and the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

II.

On or about October 15, 1925, plaintiff and defendant entered into a contract in writing for the construction by plaintiff for defendant of a line of railroad from Orofino to Headquarters, in the State of Idaho. A copy of said contract is attached hereto,

marked Exhibit A. Pursuant to the terms of the contract as modified in the respects hereinafter stated, plaintiff engaged in the construction of said railroad during the years 1925, 1926 and 1927.

III.

Under the terms of said contract the defendant reserved the right to change the work contracted for in whole or in part, and to increase or diminish the amount of work to be done, to stop any part of the work or the whole thereof, or to require additional or extra work at any time. The terms of the contract also provided that all questions to arise therefrom, including any increase or decrease in the unit prices to be paid to plaintiff, any reclassification or special classification of materials excavated and the prices to be paid therefor, and any and all questions that might occur in relation to the provisions of the contract, the true intent and meaning thereof or the manner of performance, were to be left to the Chief Engineer of the defendant; [40] and said Chief Engineer was made the umpire to decide all such questions, and it was provided by the contract that his decision should be final and conclusive on the parties.

IV.

The construction of the railroad described in the contract between plaintiff and defendant contemplated and necessarily required adequate financing and careful and effective organization of the different branches of the work on the part of plaintiff, in

that the work contracted to be done involved a large amount of excavation and grading in a mountainous region as well as extensive bridge work, track construction and other work ordinarily included in railroad construction. And it was understood that plaintiff would sublet, and plaintiff did in fact sublet, substantially all of the work contracted for to a number of subcontractors, all of whose operations plaintiff undertook to supervise and finance.

Notwithstanding its obligation in this respect, plaintiff failed and neglected to provide adequate financing for the conduct of the work contracted for and failed to organize the work promptly and effectively, and as a result the entire construction work was constantly subjected to interruptions and delays which caused defendant great and unnecessary expense in the effort to insure the continuation of the work and its completion within the time required.

Because of the failure on the part of plaintiff to adequately finance and properly organize the work, plaintiff and its subcontractors in the latter part of the year 1926 became and were unable to continue the prosecution of the work. Plaintiff thereupon applied to defendant for additional [41] allowances and payments over and above those shown to be due by the current engineers' estimates, and represented that it could not continue in the performance of the contract without such additional payments and allowances; and defendant in order to avoid the cessation of work by plaintiff and to

insure the continuation of the work and the completion of the railroad within the time required, was forced to make and did make large additional allowances and payments to plaintiff on account of work done, but in excess of the sums due plaintiff upon the current monthly estimates of the engineers, and likewise was forced to assume and pay, and defendant did assume and pay, substantial items of cost and expense in connection with the construction of said railroad which it would not have been necessary to assume or pay if plaintiff had supplied adequate financing for and had properly organized the work contracted for.

The amounts so advanced and paid to plaintiff over and above the amounts due upon the monthly estimates, and the amounts so necessarily assumed and paid by defendant because of the default of plaintiff as aforesaid, comprise many items applicable to different branches of the work and a complete statement thereof cannot be made without an accounting of all matters between plaintiff and defendant, but defendant alleges the fact to be that the total amount of such additional allowances and payments, together with the items of cost and expense necessarily assumed and paid by defendant in connection with the grading work contracted for, exceeded the sum of \$120,000.00, and such additional allowances and payments, together with such items of cost and expense in connection with the bridge work contracted for, exceeded the sum of [42] \$23,000.00, and such additional payments and allowances, together with such items of cost and expense

in connection with track and ballast work and in the general performance of the contract, exceeded the sum of \$58,000.00.

V.

Notwithstanding such additional allowances and payments and notwithstanding the assumption of such items of cost and expense as aforesaid, plaintiff in the month of April, 1927, became and was so heavily indebted to material and supply men and others with whom it had dealt in the performance of said contract, that it was impossible for plaintiff to continue work under said contract, and plaintiff became and was in default thereunder. By reason of such default defendant, in order to avoid cessation of the work and to insure its continuance and to insure the completion of the railroad within the time required, was thereupon forced to make additional advances to plaintiff over and above those made prior to that time as heretofore alleged. Thereupon and on the 26th day of April, 1927, plaintiff and defendant entered into a supplemental contract under the terms of which defendant undertook and agreed to advance for the account of plaintiff all sums necessary for the payment of bills owing by plaintiff for material and supplies actually put into the construction work. A copy of said supplemental contract is hereto annexed, marked Exhibit B.

VI.

Under the terms of said supplemental contract defendant from and after April 26, 1927, and con-

tinuing until the conclusion of all work by plaintiff under the original construction contract, advanced and paid all of the outstanding [43] bills of plaintiff covering items of material and supplies which had gone into the construction of said line of railroad, and applied the amounts thereafter ascertained to be due plaintiff as shown by the engineers' estimates, in reimbursement of the sums so advanced to pay bills of the plaintiff.

VII.

From time to time after April 26, 1927, and in accordance with said supplemental contract, defendant made advances to plaintiff and for its account in large sums in order to pay outstanding bills incurred by plaintiff in the prosecution of the work of constructing said railroad, and at the conclusion of the work the total amount so advanced by defendant, together with the amount theretofore advanced by defendant and assumed and paid by defendant, was greatly in excess of the amount due plaintiff as determined by the engineers' estimates. At the conclusion of the work a final estimate was duly and promptly prepared by the engineers of defendant showing the balance due plaintiff under the terms of the original contract, but not attempting to show the net amount due plaintiff after offsetting against said balance all prior advances and allowances made as hereinabove alleged. At the specific request of plaintiff said final estimate was not signed by the Chief Engineer of defendant nor formally tendered to plaintiff but was withheld be-

cause of plaintiff's request that the final determination of the amount ultimately due plaintiff be reserved. The determination of the Chief Engineer of defendant as to the amount due plaintiff for work done is final and conclusive upon plaintiff under the terms [44] of the contract, but the net amount due plaintiff, if any, cannot be determined until an accounting is had of all matters between plaintiff and defendant; and upon such accounting defendant is ready and willing to pay to plaintiff such sum as an accounting may show is finally due plaintiff.

VIII.

In the month of August, 1926, defendant exercised the right reserved to it under the terms of the original contract between plaintiff and defendant, to change the work contracted for and to stop a part thereof, and thereupon notified plaintiff that at once upon completion of tracklaying upon the first twenty-nine miles of track of said railroad, no further work would be required of plaintiff on that part of said railroad, and that defendant would take over and itself do such additional work as might be necessary for the completion thereof. And on or about July 16, 1927, defendant in accordance with said notice to plaintiff changed the work provided for by said contract and stopped a part thereof by taking over and it thereupon did take over and thereafter complete said first twenty-nine miles of the railroad referred to in the contract.

IX.

Prior to August 16, 1926, plaintiff objected to the proposed exercise of said reserved right and raised a question of defendant's right so to take over and complete the first twenty-nine miles of the railroad. The question thus raised was thereupon submitted to the Chief Engineer of defendant pursuant to the terms of the contract, and said Chief Engineer thereupon determined that under the terms of the contract defendant had the right so attempted to be [45] exercised. The decision so made became and is, under the provisions of the contract, final and conclusive upon plaintiff, and plaintiff at once assented to and acquiesced in said decision.

X.

Prior to August 21, 1926, plaintiff made demand upon defendant for compensation for hauling materials in work trains upon the said railroad as fast as track was laid on the following basis: Timber at 85 cents per thousand F. B. M. per mile, piles at 2 cents per lineal foot per mile, and metal fastenings at 65 cents per ton per mile. Defendant refused to accede thereto and notified plaintiff that said rates were applicable only to team haul and not to transportation in work trains on the newly constructed track. The question thus raised was thereupon submitted to the Chief Engineer of defendant pursuant to the terms of the contract, and said Chief Engineer thereupon determined that under the terms of the contract defendant had the right so attempted to be exercised. The decision so made

became and is, under the provisions of the contract, final and conclusive upon plaintiff, and plaintiff at once assented to and acquiesced in said decision.

XI.

The transactions between plaintiff and defendant in connection with the construction of the line of railroad under the contracts as hereinabove set forth, extend over a period in excess of two years and involve mutual running accounts embracing many thousands of items with total debits and credits in excess of three million dollars (\$3,000,000.00), and it is and will be impossible to arrive at correct and [46] adequate determination of the state of such account at the present time or to determine what, if anything, is due plaintiff from defendant, or due defendant from plaintiff, as a result of said transactions, without a full and complete accounting had in accordance with the practice of this Honorable Court in causes of equitable cognizance. Defendant can have herein no plain, speedy or adequate remedy or defense at law and justice cannot be done between the parties hereto except by employing the methods of investigation peculiar to this Honorable Court upon the equity side thereof.

Wherefore, having fully answered, defendant prays that further proceedings at law upon the complaint of plaintiff be stayed, and that this cause be transferred to the equity side of the Honorable Court; that thereupon this Honorable Court require a full and complete accounting between the parties

hereto, and upon such accounting by its decree grant defendant judgment against said plaintiff in such amount as may thereby be established to be due said defendant from said plaintiff, together with its costs and disbursements herein to be taxed, and together with such other, further and different relief as defendant should in equity obtain, and this defendant will ever pray.

CHARLES A. HART,
L. B. DA PONTE,
CAREY AND KERR,
Attorneys for Defendant. [47]

State of Oregon
County of Multnomah—ss.

I, Charles A. Hart, being first duly sworn, depose and say: That I am one of defendant's attorneys in the above entitled cause; that I have read the foregoing answer and that the same is true as I verily believe.

I further depose and say that I make this verification on behalf of defendant for the reason that no officer or agent of defendant is present within the County of Multnomah or State of Oregon.

CHARLES A. HART.

Subscribed and sworn to before me this 30th day of March, 1929.

[Notarial Seal] PHILIP CHIPMAN,
Notary Public for Oregon.

My commission expires: Aug. 28, 1931. [48]

Form 109-A General Contract. 10-7-24 1M RP
EXHIBIT "A"

Date.—Parties.

Agreement made the Fifteenth (15th) day of October A. D. 1925 between the Northern Pacific Railway Company hereinafter called the "Company" and Twohy Brothers Company of Spokane, Washington, hereinafter called the "Contractor."

Work.

The Contractor agrees to furnish all labor, services and material for, except as may be hereinafter otherwise provided and to construct, complete and finish in the most thorough workmanlike and substantial manner in every respect to the satisfaction of the Chief Engineer of the Company, within the time hereinafter specified, and according to the specifications hereto annexed and made part of this contract, the clearing, grubbing, grading, culverts, bridging, tunnels, tracklaying and ballasting and all other work for which prices are hereinafter named on the branch line of the Railway Company extending from Oro Fino to Headquarters in the state of Idaho.

Date of Completion.

The work is to be commenced immediately and the grading, bridging, tunnels and tracklaying are to be completed on or before June 1, 1927, and all work on or before September 1, 1927.

Definition of Terms.

Where the word "Engineer" occurs in this contract or specifications attached hereto it refers to the Engineer of the Company in charge for the time being of the work of construction; and "Chief Engi-

neer'' means the Chief Engineer of the Company from time to time.

Keep Crossings Open and Safe.

The Contractor will keep open and in safe condition for use all crossings and approaches wherever the railroad is crossed by, or is adjacent to, public or private roads, and will alter said roads and approaches whenever required by the Company's Engineer.

Local Regulations.

The Contractor shall obtain, at his own expense, all necessary permits and shall comply in all respects with any ordinances, laws or regulations of the general or local government properly applicable to the work.

Sub-Contracts.

The work shall be performed under the personal supervision of the Contractor and neither this contract or any interest therein shall be assigned, nor said work or any part thereof sub-contracted without the written consent of the Chief Engineer to every such assignment or sub-contract. [49]

Complying with instructions.

The Contractor in all things will conform to the instructions of the Engineer and his duly appointed assistants.

Lines, Levels and Marks.

All lines, levels and marks necessary for constructing the work in accordance with the plans and specifications will be furnished the Contractor by the Engineer.

The Contractor shall be solely responsible for the construction of the work in accordance with said lines, levels and marks, and for any disturbance or displacement of marks from their position as finally located by the Engineer.

Work when and where Directed.

The Contractor will carry on the work in such a manner and at such times and at such points as the Engineer from time to time shall direct, and all working plans and methods of carrying on the work shall be submitted in detail to the Engineer for his approval before proceeding with the work. Such approvals of the Engineer are understood to cover the general methods of procedure only and the Contractor shall have full control of his employees engaged upon the work and be solely responsible for all personal injuries caused in any manner by carrying on any work under this contract.

Remedy Faulty Work.

All imperfect or insufficient work or material shall be remedied immediately when pointed out and shall be made good and sufficient to the satisfaction of the Engineer, and omission by the Engineer to disapprove of or reject insufficient or imperfect work or material at the time of any monthly or other estimate shall not be deemed an acceptance of such work or material; and the Engineer shall have the power at all times to have defective work or material taken out and rebuilt or replaced at the expense of the Contractor.

The Contractor shall protect the Company against claims on account of patented devices or parts used by him on the work.

No Liquors—Disorderly Workmen.

The Contractor will not bring or permit to be brought anywhere on or near the work spirituous or other intoxicating liquors; and if any foreman, laborer or other employe of the Contractor or of any sub-contractor, shall be in the opinion of the Engineer intemperate, disorderly, incompetent, wilfully negligent or dishonest in performance of his duties, he shall be on request of the Engineer forthwith discharged; the Contractor will not employ nor permit to remain about the work any person who from said work or from any other part [50] of the Company's railroad may have been discharged for any of the causes mentioned in this paragraph.

Extra Work and Bills therefor.

No extra work or material is to be allowed or paid for, excepting that done or furnished in performance of a previous order in writing of the Engineer, and all claims for extra work or material must be presented to the Engineer for allowance at the close of the month in which the work shall have been done or material furnished, otherwise all claim therefor shall be deemed waived.

Arbitration.

To prevent disputes and misunderstandings between the parties and to provide for the speedy settlement of such as may occur in relation to the provisions of this agreement, or the true intent and meaning hereof, or the manner of performance by either party, the Chief Engineer of the Company is made the umpire to decide all such differences; he shall also decide the amount and quantity, character

and kind of work done and materials furnished by the Contractor, including all extra work and material; and his decision shall be final and conclusive on the parties.

Prices for Work.

The prices to be paid by the Company for the work are as follows:

(1)	Heavy Clearing, Per acre	\$165.00
(2)	Clearing sage brush, greasewood and other brush, per acre	45.00
(3)	Cutting Isolated and dangerous trees, each	3.00
(4)	Grubbing, Per Acre	180.00
(5)	Common Excavation, per cu. yd.	0.38
(6)	Hard Pan, Per Cu. Yd.	0.55
(7)	Loose Rock, per Cu. Yd.	0.65
(8)	Solid Rock, Per Cu. Yd.	0.99
(9)	Solid Rock Borrow, per Cu. Yd.	0.99
(10)	Overhaul, per Cu. Yd. per each 100-Ft. beyond 500 Ft. Free Haul	0.02
(10A)	For Train haul grading Oro Fino Yard and Branch line connection—Flat price including haul up to two miles per Cu. Yd.	0.45
	(Railway Company to permit use of its existing trackage, furnish material for temporary tracks and water for locomotives) [51]	
(11)	Corduroy, in place per cu. yd.	3.00
(12)	Loose Riprap, in place, from borrow, per cu. yd.	1.85

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| (13) Loose Riprap, in place, from Excavation, per Cu. Yd. | 0.80 |
| (14) Hand Placed Riprap, in place, including the paving of culverts, from Borrow, per Cu. Yd. | 3.50 |
| (15) Hand Placed Riprap, in place, including the paving of culverts, from Excavation, per cu. Yd. | 2.50 |
| (16) Dry Wall Protection work, in place at culvert ends, etc. from borrow, per Cu. Yd. | 7.00 |
| (17) Dry Wall protection work, in place at culvert ends, etc., from excavation, per cu. yd. | 6.00 |
| (18) Blind drains, in place, including brush top, per Cu. Yd. | 3.50 |
| (19) Driving Piles in protection work, per lineal foot above cut-off
(Railway Company to furnish piles). | 0.18 |
| (20) Driving Piles in protection work, per lineal foot below cut-off
(Railway Company to furnish piles). | 0.32 |
| (21) Driving piles in protection work, per lineal foot above cut-off
(Contractor to furnish cedar piles at the site of structure). | 0.32 |
| (22) Driving piles in protection work, per lineal foot below cut-off
(Contractor to furnish cedar piles at the site of structure). | 0.44 |

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| (23) | Furnishing, hauling and placing local round cedar logs in cribs and bulkheads for protection work, and placing metal fastenings, per lineal foot of logs placed
(Railway Company to furnish metal fastenings). [52] | 0.32 |
| (24) | Furnishing, hauling and placing local round pine logs in cribs and bulkheads for protection work, and placing metal fastenings, per lineal foot of logs placed
(Railway Company to furnish metal Fastenings). | 0.30 |
| (25) | Furnishing and placing rock in re-
vetments and dykes, etc., per cubic yard in place | 2.50 |
| (26) | Furnishing, hauling and placing brush, per cord in Place | 16.00 |
| (27) | Placing sawed timber in culverts, including metal fastenings per thousand F. B. M. in place
(Railway Company to furnish timber and metal fastenings). | 13.50 |
| (28) | Furnishing, hauling and placing sawed local timber in culverts, and placing metal fastenings, per thousand F. B. M. in place
(Railway Company to furnish metal fastenings). | 38.00 |

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| (29) Furnishing, hauling and placing logs in culverts, and placing metal fastenings, per lineal foot of logs in place
(Railway Company to furnish metal fastenings). | 0.28 |
| (30) Placing 24" concrete culvert pipe, per lineal foot of culvert in place
(Railway Company to furnish pipe) | 1.10 |
| (31) Placing 36" concrete culvert pipe, per lineal foot of culvert in place
(Railway Company to furnish pipe) | 1.80 |
| (32) Placing 18" corrugated iron culvert pipe, per lineal foot of culvert in place
(Railway Company to furnish pipe) | 0.60 |
| (33) Placing 24" corrugated iron culvert pipe, per lineal foot of culvert in place
(Railway Company to furnish pipe) | 0.80 |
| (34) Placing 36" corrugated iron culvert pipe, per lineal foot of culvert in place
(Ry. Co. to furnish Pipe) [53] | 1.10 |
| (35) Hauling for concrete pipe, per ton per mile | 0.65 |
| (36) Hauling for corrugated iron pipe, per ton per mile | 0.85 |
| (37) Hauling piles furnished by the Company, per lineal foot per mile | 0.02 |
| (38) Hauling Timber furnished by the Company, per thousand, F. B. M., per mile | 0.85 |

(39) Hauling metal fastenings, per ton per Mile	0.65
(40) Hauling galvanized iron, per ton per Mile	0.65
(41) Hauling cement, per sack per mile	0.04
(42) Driving piles in trestles, bents, per lineal foot above cut-off (Railway Company to furnish piles)	0.18
(43) Driving Piles in trestle bents, per lineal foot below cut-off (Railway Company to furnish piles)	0.32
(44) Driving piles in trestle bents, per lineal foot above cut-off (Contractor to furnish cedar piles at the site of structure)	0.32
(45) Driving piles in trestle bents, per lineal foot below cut-off (Contractor to furnish cedar piles at the site of structure)	0.44
(46) Driving piles in trestle bents, per lineal foot above cut-off (Contractor to furnish piles for temporary work at site of structure)	0.32
(47) Driving piles in trestle bents, per lineal foot below cut-off (Contractor to furnish piles for temporary work at site of structure)	0.44
(48) Placing sawed timber in pile or frame trestles, including metal fastenings, per thousand F. B. M. in place (Railway Company to furnish timber and metal fastenings) [54]	16.50

- (49) Furnishing, hauling and placing sawed local timber in pile or frame trestles, and placing metal fastenings, per thousand F. B. M. in place 43.00
(Railway Company to furnish metal fastenings).
- (50) Furnishing, hauling and placing round local timber in frame trestles, and placing metal fastenings, per lineal foot in place 0.50
(Railway Company to furnish metal fastenings)
- (51) Furnishing, hauling and placing local round cedar timber in frame trestles, and placing metal fastenings, per lineal foot in place 0.53
(Railway Company to furnish metal fastenings)
- (52) Placing galvanized iron fire protection on bridges, per pound in place 0.025
(Railway Company to furnish galvanized iron)
- (53) Furnishing, hauling and placing local round cedar logs in pier cribs and placing metal fastenings, per lineal foot of logs placed 0.32
(Railway Company to furnish metal fastenings)
- (54) Furnishing, hauling and placing local round pine logs in pier cribs, and placing metal fastenings, per lineal foot of logs placed 0.30
(Railway Company to furnish metal fastenings)

(55)	Furnishing and placing rock in pier cribs, per cubic yard of rock in place	2.50
(56)	Dry foundation excavation, common material, per cubic yard	0.60
(57)	Dry foundation excavation, loose rock, per cubic yard	1.20
(58)	Dry foundation excavation, solid rock, per cubic yard	2.00
		[55]
(59)	Wet foundation excavation, common material, per cubic yard	2.50
(60)	Wet foundation excavation, loose rock, per cubic yard	3.50
(61)	Wet foundation excavation, solid rock, per cubic yard	5.00
(62)	Furnishing materials and placing concrete 1-3-5 Mixture in pedestals for support of frame bents, per cubic yard	22.50
(63)	Furnishing materials and placing concrete 1-3-5 mixture in bridge piers, per cubic yard	20.00
(63a)	Hauling concrete aggregates per ton per mile	0.60
(64)	Furnishing materials and placing rubble masonry in pedestals and piers, per C. Yd.	17.50
(65)	Tracklaying, including running surface, unloading and reloading material at material yard, transporting it to the front, curving rails, placing road crossing planks, track markers	

- and signs and reloading all surplus track material, per mile of track 1400.00
(Railway Company to furnish all material)
- (66) Switches complete in place, each 120.00
(Railway Company to furnish material)
- (67) Placing tie plates, per mile of track 250.00
(Railway Company to furnish material)
- (68) Application of rail anchors, per anchor in place 0.03
(Railway Company to furnish material)
- (69) Full earth surface, per mile of track 1200.00
- (70) Loading, unloading and placing ballast under track and finishing to section when total lift is 8" or less, per cubic yard 0.80
- (71) Loading, unloading and placing ballast under track and finishing to section when total lift is over 8" per cubic yard, said unit price to apply to the entire amount of ballast placed 0.80
- [56]
- (72) Handling, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service

of other contractors, to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company, per car mile		\$ 1.00
(73)	Handling cars of material in addition to contractor's own material and that covered by his contract, as required, from operated line set out track to material yard tracks for unloading, including all necessary switching and spotting, per car	10.00
(74)	Tunnel excavation for a net section of 377 square feet, including 500 foot free haul of excavated material, per lineal foot of tunnel	95.00
(75)	Tunnel excavation outside of 377 square feet net section, including 500 foot free haul of excavated materials, per Cu. yard	4.50
(76)	Placing sawed timber in permanent tunnel linings, including metal fastenings, per thousand F. B. M. in place (Railway Company to furnish timber and metal fastenings)	22.50
(77)	Furnishing, hauling and placing sawed local timber and metal fastenings, in permanent tunnel linings, thousand F. B. M. in place	56.00

(78) Furnishing, hauling and placing hewed local timber and metal fasten- ings in permanent tunnel linings per thousand F. B. M. in place	56.00
	[57]

Transportation.

The Railway Company will furnish free transportation over the line of the Northern Pacific Railway Company, subject to the review and instructions of the Chief Engineer as to the necessity for and proper use of same, as follows:

Passenger Transportation.

Passenger Transportation: (To be used only when traveling on business in connection with this contract).

1. For one member and one superintendent of the Contractor's firm or corporation, passes good on Northern Pacific System.

2. For Sub-contractors from any point on the Northern Pacific System to the Northern Pacific Railway station nearest the site of the work and return.

3. For foreman, and laborers, from any point on the Northern Pacific System to the Northern Pacific Railway station nearest the site of the work.

4. Return transportation will be furnished to such foremen and skilled labor as may remain until completion of the class of work on which employed, but no free return transportation will be granted for common laborers.

Freight Transportation.

Freight Transportation:

1. For all material to be used in the work (except as hereinafter provided) from any point on the Northern Pacific System to the Northern Pacific Railway station or spur track nearest the site of the work.

2. For tools, outfit and equipment used in the work from any point on the Northern Pacific System to the Northern Pacific Railway station or spur track nearest the site of the work and return to the point from which same were originally shipped to the work, or to any intermediate point on the line of the Railway Company. The right to such free return transportation must be exercised within ninety (90) days after the date of completion of the work, after which time no free transportation will be furnished.

3. The Contractor shall pay full tariff rates on all coal except blacksmith coal "sacked", boarding and commissary supplies, hay and grain, lumber for camps, powder and explosives, and shall buy all materials, if possible, at points which will permit the Company to receive the haul on same, routing same via the lines of the Company and its connecting lines. [58]

Transportation—General.

Exceptions may be made in the above stipulations covering passenger and freight transportation, and additional or other transportation may be furnished, as in the discretion of the Chief Engineer may be

found necessary for the proper handling of the work.

Demurrage Charges.

Nothing herein contained shall be construed to relieve the Contractor of payment of demurrage charges under Car Service Rules. Claims for cancellation or refund of demurrage on account of inclement weather, or for other reasons, shall be presented to the Engineer in charge of the work within fifteen (15) days after presentation of demurrage bills by the Company, and it is hereby agreed that no claim shall be presented after the expiration of the above time limit.

Price for extra work.

For extra work, or work done under written orders of the Engineer for which prices are not named herein, the Contractor shall be paid his actual outlay in such work and ten per cent additional.

Estimates—Payments.

Approximate estimates of the work done are to be made by the Engineer or his assistants at or about the end of each calendar month; and payment of the amount of each monthly estimate will be made by the Company on or about the twentieth day of the following month, less however all previous payments and less ten per cent of such estimate.

Retained percentage.

Ten per cent upon all monthly estimates shall be retained until, and as security for, complete performance of this contract.

Stopping work.

The Company at any time before completion may stop the work or any part thereof, or may reduce the force employed or retard the work or any part thereof. On receiving such direction the Contractor shall stop work or diminish the force as directed, and shall have no claim whatsoever for damages by reason thereof, but shall receive payment for the work done in full discharge and satisfaction of all demands against the Company. Any notice given by the Company under this paragraph shall be in writing signed by the Chief Engineer, and shall be delivered to the Contractor or some person on the work representing him at least five (5) days prior to the required stoppage or reduction.

Accelerating work.

If at any time the Contractor shall not be in the opinion of the Chief Engineer progressing with the work as fast as necessary, or with sufficient force to insure its completion within the contract time, the Chief Engineer may direct the Contractor to put on such additional force and means as in his judgment are necessary, and on the failure of the Contractor to comply with such directions, the Chief [59] Engineer may declare this contract terminated; and in such case the amount of moneys then remaining unpaid including the percentage retained on all monthly estimates, shall be kept by the Company until the work is completed, and the Company may employ such force and means as in its judgment shall be necessary to complete the work and the cost thereof shall be paid by the Contractor.

Retained percentage forfeited.

Power to cancel contract.

If the Contractor at any time shall fail to perform any agreement herein contained the Company may cancel this contract; in which event the Contractor shall have no claim for damages, or for compensation for work done or material furnished, or for any portion of the percentage retained on monthly estimates; and the Company shall have the right to take possession of and hold the work done and material furnished and to retain all moneys which may be then unpaid.

Contractor to pay all laborers.

The Contractor will pay promptly all laborers and others in his employ as their pay falls due, and pay promptly as they fall due all bills for material and supplies going into the work, and in the event of his failure at any time to do so the Company may retain from subsequent estimates such amounts of money as the Chief Engineer may deem requisite to pay the laborers and all others employed on the work and the said supply and material bills. Before final settlement is made the Contractor shall furnish to the Company satisfactory evidence that the work is free and clear from all liens for labor or materials and that no claim exists out of which a lien may grow.

Contractor to pay damages to crops, etc.—Retention of claims from final estimate.

The Contractor assumes and agrees to pay for all injury or damage to crops, fences, farm improve-

ments, or any other property caused by the prosecution of the work and all damages by fire started from the right of way, except damage to real estate made necessary by the work. When the final estimate is made, should there be any unsatisfied claim for such damage, the Company may deduct from the moneys owing the Contractor a sum equal to the amount so claimed together with the estimated cost of adjusting the claim. Such moneys shall be retained until all damages are satisfied when the remainder shall be paid over to the Contractor.

Temporary suspension.—Extension of time.

If the work be delayed materially from any act or neglect of any agent or employe of the Company, the time for completion shall be extended for a period equal to such delay and the Contractor shall have no further or other claim upon account of such delay. He must make claim to the Chief Engineer in writing for extension at the time of the delay, [60] stating the occasion and nature thereof, and failing to do so his right to extension shall be waived.

Total suspension.

In case of a total suspension of all work for over ninety days without any fault or procurement of the Contractor, unless such suspension shall have been caused by the winter season or protracted rigor of weather, the Chief Engineer shall make a final estimate and the amount so estimated shall be paid to the Contractor; he shall be entitled to receive only that proportion of the contract price which the

amount of work done and material furnished bears to the total amount covered by the contract.

Insurance.

Damage by fire to buildings or structures during construction will be made good by the Contractor, who will keep all structures fully insured until completion and acceptance by the Company. The cost of insurance will be divided equally between the parties, the policies written in the name of both, loss payable as their interest may appear, and deposited with the Chief Engineer.

Final estimate.—Time of payment of final estimate and retained percentage. Release.

When in the opinion of the Chief Engineer this contract shall have been performed, he shall so certify in writing and give a final estimate and statement of the balance unpaid; and the Company within thirty days thereafter will pay the full balance. The Contractor at final payment will execute, acknowledge and deliver to the Company under his hand and seal a valid discharge from all claims and demands growing out of or connected with this contract.

Contractor's base of information.

This contract is entered into by the Contractor solely on his own knowledge, and on information derived from others than the Company, its officers or agents, respecting the nature and formation of the country in which the work is to be done, and the character, quantities and location of the material required to be removed, or to be used in the road-bed.

Where borings or soundings for foundation of structures are indicated on the plans, it shall be understood that this data has been obtained for guidance in the design of the structure, and the Company will assume no responsibility contingent upon the accuracy of the borings or soundings. [61]

Right reserved to change line of R. R. and the amount of work.

The Company reserves the right at any time to change in whole or part, as it may seem expedient, the line and grade of the railroad or the amount of work embraced in this contract, and any change of the line or grade or bridges shall not affect the prices herein stated; nor shall any bill for "extras" or other charge or claim be made by reason thereof, or of any difference occasioned by such change in the quantity, location or nature of the work to be performed. But if the Chief Engineer shall deem the change to have materially affected the cost of doing the work, he shall determine the price to be paid, either above or below, as the case may be, the prices herein provided, so as to do substantial justice between the parties.

Execution.

In Witness Whereof, the Company has caused these presents to be signed by its duly authorized officer and the Contractor has hereunto set his hand and seal.

NORTHERN PACIFIC RAILWAY
COMPANY

Witness as to the Company

By (Sgd.) H. E. STEVENS,
Chief Engineer.

(Signed) R. E. GEMMELL

(Seal) TWOHY BROTHERS COMPANY

(Seal) By (Sgd.) JAMES TWOHY, Secy.

Witness as to the Contractor

(Sgd.) M. S. BOSS. [62]

NORTHERN PACIFIC RAILWAY CO.
ORO FINO BRANCH
CONSTRUCTION
SPECIFICATIONS:

Part

1. Clearing, Grubbing, Grading and Pipe & Timber Culverts.
2. Tunnels.
3. Bridging.
4. Tracklaying and Surfacing. [63]

PART 1
SPECIFICATIONS FOR
GRADING
AND CONSTRUCTION OF
PIPE AND TIMBER CULVERTS
CONTENTS

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(1) General.

Definitions.

1. The term "Company" as used herein refers in all cases to the Railway Company making the contract of which these specifications are a part.

2. The term "Contractor" as used herein refers in all cases to the persons, person's partnerships, or corporations engaged in the contract, of which these specifications are a part.

3. Wherever the word "Engineer" occurs in these specifications or in the contract attached hereto, it refers to the Engineer of the Company in charge for the time being of the work of construction; and "Chief Engineer" means the Chief Engineer of the Company.

Supervision of Work.

4. All work shall be done in a neat and workmanlike manner, and under the supervision of the Chief Engineer of the Company, and shall conform to these specifications, unless otherwise directed by the Chief Engineer.

Preliminary estimate and Classification.

5. Preliminary estimated quantities and classification, if shown on the profile, or furnished the Contractor, are approximate only and will in no way govern the final estimate. The Company reserves the right to increase or [65] diminish the approximate estimated quantities without affecting the contract unit prices for the various parts of the work except as provided in the contract.

Verification of Plans and Physical Conditions.

6. If the Contractor, in the course of the work, finds any discrepancy between the plans and the physical conditions of the locality, or any errors in plans or in the layout as given by said points and instructions, it shall be his duty to immediately inform the Engineer. Any work done after such discovery, until verified, shall be done at the Contractor's risk.

Defective Work.

7. Any omission to disapprove of work at the time of making any monthly or other estimate, will not be construed as an acceptance of any defective work, and the Contractor must remove and rebuild, or make good at his own cost, any work which the Engineer may consider to be defectively executed.

Red Lights at Crossings.

8. The Contractor shall, during the progress of the work, provide and put in place, red lights on each side of the track for highways across same at points where changes are made in roadway. These lights shall be in place and lighted between sunset and sunrise, and shall be continued until crossings and roadway have been put in good, passable condition and approved by the Engineer.

9. The Contractor shall at his expense keep all highway crossings and temporary detours in passable and safe condition at all times as directed by the Engineer in charge of the work and to the satisfaction of the Public Officials. [66]

Temporary Fences.

10. Previous to, or during the work of grading, the Contractor shall be required to erect and maintain such temporary fences as may be necessary to prevent trespass upon the Railway or damage to adjoining property.

Tote Roads.

11. No allowance or compensation whatever shall be due or paid to the Contractor for any tote roads,

trails, bridges or trestles incident thereto, he may construct to facilitate his work.

(2) Clearing and Grubbing.

Clearing.

12. As much ground included in the right of way as the Engineer in charge of the work may direct, shall be cleared of trees, logs, brush and rubbish, the work of clearing shall be kept at least 1000 feet in advance of grading.

Limits of Clearing.

13. The clearing will usually extend fifty (50) feet each side of the center line or of such width as may be directed by the Engineer. Any trees outside of that limit considered unsafe by the Engineer, shall be cut down and disposed of as other clearing.

Height of Stumps.

14. All trees, snags and old stumps outside the toe of slope but within the clearing limits must be cut so that tops of same shall not be over three (3) feet above surface of ground. All undergrowth and brush shall be close cut.

Merchantable Timber.

15. Usable logs and other wood shall, if so directed by the Engineer, be piled or skidded at designated locations. All other logs, limbs, wood, brush and other vegetable matter shall be removed from the ground or burned without injury to or endangering adjacent property. This burning [67] can only be done during certain months, and under the

instructions of the Fire Warden of the State of Idaho in whose district the work is being carried on. The Contractor shall inform himself of these regulations, and be governed accordingly. No stumps, logs, brush, or other refuse shall be placed on adjacent land, except by written directions of the Engineer, and after permit from property owner has been secured, nor shall same be dumped into any river or creek.

Removal of Debris.

16. From ground adjacent to excavation, all logs, loose stumps, roots, and brush must be thoroughly cleared, so they cannot fall or be washed into cuts or ditches, and so as to furnish ample space for any required drains or surface ditches at the sides of cuts.

17. From ground to be occupied by embankments, all trees, logs, brush, rubbish and other perishable matter shall be entirely removed.

Close Cutting.

18. Where embankments are to two (2) feet high, or more, and through station grounds, and shop grounds, all trees, stumps, and brush shall be cut off even with the surface of the ground and removed.

Grubbing.

19. Where embankments are to be two (2) feet or less in height, all stumps and large roots must be grubbed out and removed, but it will not be done where embankments are more than two feet high. [68]

Where required and Allowed.

20. Grubbing will be allowed and paid for only when the roadbed excavation is four (4) feet or less in depth, or embankment is two (2) feet or less in height. The cost of grubbing where roadbed excavation is more than four (4) feet deep, will be included in the price per yard for grading.

Grubbing in Borrow Pits.

21. Grubbing in borrow pits will not be paid for. The price per yard for borrow will include all necessary grubbing.

Units of Clearing and Grubbing.

22. Clearing and grubbing will be paid for by the acre or fraction thereof, and only for the surface where actually done.

Subgrade

(3) Roadbed.

23. The grade line on the profile denotes subgrade, and this term indicates the tops of the embankments, and bottom of excavations ready to receive the ballast.

Finished Roadbed.

24. When finished and properly settled, roadbed shall conform to the finishing stakes set for it by the Engineer.

Width of Slopes and Excavation at Profile Grade.

25. The width of the roadbed in earth excavation for single track shall be twenty (20) feet wide at profile grade, with slopes of one (1) horizontal to one (1) perpendicular, unless otherwise ordered by the Engineer. All cuts shall have side ditches

one (1) foot below sub-grade slopes and (1) to one (1).

26. The width of the roadbed in solid rock excavation for single track shall be eighteen (18) feet wide at the profile grade, with slopes of one (1) horizontal to four (4) per- [69] pendicular, or otherwise as said Engineer may direct. Solid rock cuts shall be excavated to the depth of one foot below the subgrade, and backfilled to subgrade with suitable material. Excavation pay quantities shall be the cross sectional area of the prism to a depth of one foot below subgrade only, regardless of overbreak or swell. Backfill will be measured and paid for as embankment.

Width and Slopes of Embankments at Profile Grade.

27. The width of roadbed on embankments for single track shall be sixteen (16) feet wide at profile grade. Side slopes shall be one and one-half ($1\frac{1}{2}$) horizontal to one (1) perpendicular, unless otherwise ordered by the Engineer.

Extra Widths.

28. For each additional main track, side or yard track, an additional width of embankment or excavation fourteen (14) feet, at profile grade shall be required.

Recross-Section of Cuts.

29. Where rock is encountered below the surface, the cut shall immediately be recross sectioned to rock slopes as indicated above and a berme of not less than four (4) feet shall be left between edge of

rock excavation and toe of slope of overlying earth. Where cut is so shallow, it is impossible to leave a four (4) foot berme, without changing slopes; the width of berme required may be reduced.

Intercepting Ditches.

30. Intercepting ditches shall be made at the top of the slopes of all earth cuts where the ground falls toward the top of the slopes, and they must diverge from the roadway sufficiently to prevent erosion of the adjoining embankment. The cross-section and location of such ditches shall be [70] designated by the Engineer, and if required by him, ditches shall be made in advance of opening the cutting.

31. Where required by the Engineer, Contractor shall construct ditches along the upper sides of all embankments, where no borrow pits have been excavated, in order to carry the surface water to the nearest water course. Material from all ditches shall be deposited in the embankment unless wasting is approved by the Engineer. The excavation specified in the ditches will be paid for at contract grading prices.

(4) Grading.

Definitions and General Requirements:

Work to be done.

32. Work to be done by the Contractor shall include all excavations and embankments required for the formation of the roadbed, including sidings, yard tracks and spurs, station and shop grounds; cutting all ditches and drains about or contiguous to the roadbed; all borrow pits, changing of streams,

other railways, roads and highways on or off the right of way; foundation pits for culverts, riprap, cribs, and bulkheads, and all other excavations in any way connected with, required for or incident to the construction of the railroad.

Spoil Banks.

33. At cuts where precaution against drifting snow must be taken, spoil banks shall be placed at such distance from the edge of the cuts, and in such formations as are suitable for snow protection, as the Engineer may direct.

Form and slopes of Excavation.

34. Slopes of all excavations shall be cut straight and true to the plane of the measured prisms; and all loose stones, [71] stumps and debris in the slopes must be removed.

Increasing Width of Cuts.

35. Wherever the Chief Engineer deems advisable, the Contractor will be permitted to increase the width of excavation at profile grade if necessary to do so to permit operation of grading equipment, slopes of such excavation to be steepened to maintain as closely as possible the profile cross-sectional area of the prism, but pay quantities shall be computed on basis of profile cross sections regardless of area excavated.

36. In case such increase in width of excavation is made on orders of the Engineer for any other purpose, the actual area excavated will be paid for at contract unit prices.

Disposition of Excavation.

37. All materials taken from excavations shall be deposited in the embankments except when directed otherwise by the Engineer.

38. When a cut contains material in excess of the amount required to make embankments between the limits of specified haul, such excess must be hauled and used to widen the banks equally on both sides of the center line within the limit of free haul, or otherwise wasted as directed.

Slips and Slides, Payment and Classification.

39. Material in slips, slides, and all overbreak extending beyond the slope lines will not be estimated nor paid for, unless in the judgment of the Engineer such slips, slides or overbreak were beyond the control of the Contractor and not preventable by the exercise of reasonable care and diligence and if allowed; will be classified in accordance with their condition at the time of removal regardless of prior conditions. [72]

Unauthorized work not to be paid for.

40. The Contractor will be paid only for such material as he is required and directed to excavate and dispose of. No payments will be made for material excavated outside of the limits of regular cuttings as staked out by the Engineer, nor for material deposited outside of the limits of required embankments, unless such work is done by direction of the Engineer, and then only at specified contract prices.

Use of Powder Limited.

41. The use or amount of powder in large blasts in seams, potholes, shaft or drift shots may be restricted by the Engineer.

42. Blasts shall not be so located as to disturb the material outside of the slope line of the cuts, especially in clay or hard pan cuts.

Removal of Deck of Temporary Trestles.

43. Where fills are made from temporary trestles, top of caps must be kept three (3) feet below sub-grade, and all caps, stringers, and cross-ties must be removed before filling is completed.

Embankments at Bridges, Culverts, Etc.

44. Where embankments are constructed over culverts, or where they are to abut against masonry, or trestle bridges; the earth forming such embankments shall be tamped or otherwise made as compact as possible as directed by the Engineer. If any structure be in any way injured or displaced in the construction of the roadbed, through negligence or improper methods of grading construction, used by the Contractor for grading, he shall bear the loss and shall make the same good at his sole cost. [73]

45. No embankment or fill shall be placed upon or against any culvert, wall or crib in such manner as to endanger its safety; or over or against any structure of masonry or concrete until the cement in the mortar or concrete has properly hardened and set as determined by the Engineer.

Perishable Materials.

46. Logs, stumps, brush, or other perishable material will not be allowed in embankments, and

sods will not be put in the central part of embankments less than five (5) feet high, except by permission of the Engineer.

Snow and Ice to be Removed.

47. The Contractor shall remove snow or ice from any portion of the work in any of its stages, whenever deemed necessary by the Engineer. Snow and ice removed on written orders of the Engineer shall be paid for as Extra work.

Corduroy.

48. In crossing bogs or swamps of unsound bottom, a special structure of logs and brushwood shall be furnished if required by the Engineer, the logs forming this foundation to be not less than six (6) inches in diameter at the small end. If necessary, there shall be two or more layers crossing each other at right angles, the logs of each layer being placed closely together, with broken joints and covered closely with brush; the bottom layer shall be placed transversely to the roadway and project at least five (5) feet beyond the slope-stakes of the embankment. Corduroy will be measured and paid for per cubic yard in place. [74]

Protection of Operated Property.

49. In the prosecution of work under this contract at or near an operated main track of any Railway Company everything must be subordinated to the same and uninterrupted operation of said main track, and nothing shall be done or suffered to be done by the Contractor, his agents, or employees, which will endanger or delay the trains on the operated tracks contiguous to the work.

(5) Classification.

Classes of Material.

50. Grading will be classified under the following heads: Solid Rock, Solid Rock Borrow, Loose Rock, Hard Pan, and Common Excavation.

Solid Rock.

51. Solid Rock shall include all rock occurring in masses of one cubic yard or more which both rings sharply when struck with a steel hand hammer and requires continuous blasting for economical removal.

Solid Rock Borrow.

52. Solid rock Borrow shall consist of Solid Rock, according to above classification excavated outside of the specified prism for use in filling out embankments.

Loose Rock.

53. Loose Rock shall include slate, hard shale, coal, soft sandstones, shell rock, solidly cemented gravel, and all other similar rocks when they do not have the properties required to qualify under solid rock.

54. Also, all detached rock or boulders containing one cubic foot or more, but less than one cubic yard each. [75]

Hard Pan.

55. Hard Pan shall include shales, indurated clay and other hard materials not loose or solid rock, that cannot, in the opinion of the Engineer, be reasonably plowed, on account of its own inherent hardness, by six good horses.

Isolated Strata.

56. Isolated strata of classified material occurring in a prism of common excavation will be included in the pay quantities only to the extent of the actual volume of such strata excavated.

Common Excavation.

57. Common Excavation shall include all material of every description not included in the foregoing or special classification.

Special Classification.

58. Special Classification may be established at the option of the Chief Engineer and with the consent of the Contractor when material in substantial quantities is encountered of such character that it cannot in his opinion be properly classified in any of the above defined classes.

59. Unit prices, for such material to be fixed by the Chief Engineer with due regard to prices stipulated in the contract for materials covered by contract classification.

Classification of Borrow.

60. Material borrowed for embankments will be classified strictly in accordance with the specifications, but no classification higher than Loose Rock will be allowed for such material unless with prior written authority of the Chief Engineer. [76]

(6) Haul.

Overhaul 500 to 2500 Feet.

61. The contract unit price per cubic yard for grading within limit of this class of haul shall in-

clude the actual haul for any distance not exceeding five hundred (500) feet. For any overhaul exceeding five hundred (500) feet free haul, the Contractor shall be paid per each one hundred (100) feet per cubic yard beyond five hundred (500) feet at the contract unit price for overhaul up to twenty-five hundred (2500) feet.

62. Overhaul shall apply only to material from cuts and borrow pits required to be hauled in one direction only and placed wholly within the 2500 foot extreme limit of overhaul. No material shall be required to be hauled beyond the 2500 foot extreme limit of overhaul, except on written orders of the Chief Engineer and at an agreed upon price.

63. Wherever required by the written order of the Engineer, the Contractor shall haul grading material across openings in the railway embankment not to be filled, and if a temporary bridge is required to be constructed by the Contractor for such purpose, it shall be paid for as Extra Work under the contract.

(7) Shrinkage.

Provision for Shrinkage.

64. Where it is necessary in the judgment of the Engineer to make allowance for future settlement of the embankments, either on account of their height, the character of the material of which they are built, the character of the material on which they are founded, or the manner in which the material is placed, the embankments shall be carried to such a height above subgrade and to such increased width of roadbed as the Engineer shall specify. [77]

(8) Borrow Pits.

Slopes and Drainage of.

65. The slopes or borrow pits along side of road-bed and right of way shall not be steeper than one (1) horizontal to one (1) perpendicular. If required, borrow pits shall be properly drained.

Bermes.

66. Bermes shall be left not less than six (6) feet between the foot of the slope of an embankment and the edge of an adjacent borrow pit; four (4) feet between the edge of every borrow pit and the boundary line of the Railway Company's land, and fifteen (15) feet between the edge of any regular cutting and the base of any spoil bank thereon.

Cross Bermes.

67. Where borrow pits are subject to overflow of high water, cross bermes shall be left and spaced as directed by the Engineer, and no additional allowance shall be made because of same.

Borrow not Permitted.

68. No material shall be borrowed from between the line of roadbed and an adjacent stream, where the natural surface is below highwater mark; and where it is above highwater mark no borrow pits shall be excavated to a depth below highwater mark, without written authority from the Engineer.

Borrow One Side Only.

69. Engineer may require borrow pits to be taken from one side of the road-bed only.

Borrowing below Grade.

70. Borrowing below profile grade, or wasting above profile grade shall not be done, on station or

shop grounds or sidings, except by the special permission of the Engineer. [78]

(9) Prices and Measurements of Grading Materials.

Units and Terms of Payment.

71. All grading shall be measured and paid for by the cubic yard in excavation only, except where the shape or surface of borrow pits is too irregular to be measured correctly. In such cases the quantities may be measured in embankment, the Engineer making a just and reasonable adjustment for increase or decrease in bulk, if in his judgment there be any, so that the quantities allowed shall equal the quantities excavated from borrow pit as nearly as possible.

(10) Protection Work.

Riprap General.

72. Riprap shall consist of rough stones, laid or placed on the slopes of embankments, bank of streams, dykes, crib filling and paving, about foundations, at the ends of culverts or other masonry, or in any other place for the protection of roadbed or structures. It shall consist of three classes, loose, hand-placed, and dry walls, but no part of an embankment made from solid rock excavation shall be classed as riprap.

73. The ends of all rip rap protection shall be turned into the bank, so as to prevent its being undermined or washed out.

74. Care shall be taken to make a smooth connection between rip rap and the paving of culverts and masonry.

Loose Rip Rap.

75. Loose Rip Rap shall consist of stone of such kind and size as may be approved by the Engineer, and shall be deposited by throwing on the slopes in such location and to such heights and thickness as may be directed, although [79] some re-handling may be necessary for an even distribution. Loose rip rap shall be measured in excavation.

Hand Placed Rip Rap.

76. Hand Placed Rip Rap shall consist of selected stones of kind, shape and size approved by the Engineer, and shall be laid by hand to stakes on prepared slopes of such embankments as may be designated. Unit price for hand placed rip rap shall include cutting the slope to a true and uniform surface of two (2) horizontal to one (1) vertical. Care shall be taken that the large stones are placed at the bottom of the slopes (in an especially prepared trench if necessary) and such stones shall be laid as closely together as possible so as to avoid large openings. Each stone shall be so placed that it shall rest on the slope of the embankment, and not wholly on the stone below, and wherever so directed by the Engineer it shall be thoroughly rammed, driven or placed to form a surface as smooth and even as the shape and size of the stone will permit. Hand placed rip rap shall be measured in place.

Dry Wall.

77. Dry walls shall be composed of stones of such dimensions as the Engineer may deem suitable for

the work. They must be of fair shape and spalled enough so that they will lay with good and even bearings in the wall. In general, these walls shall be built of as large stones as may be available and stones shall be well bedded upon each other. All vertical joints shall be completely filled with earth and spalls and particular attention shall be paid to the securing of proper bond by means of long headers. Slope [80] and dry walls shall be measured in place.

Paving.

78. Paving shall be made of flat stones set upon their edges, in such manner as to leave the least possible space between them, and of such size as to reach through the entire depth of the paving.

79. Great care must be taken at the ends of any piece of paving to make it secure so that it cannot be undermined or cut out by water flowing through underneath it. The lower end must receive special care to prevent the earth next the pavement being gradually washed away and thus leaving the paving stones unsupported.

Blind Drains.

80. Blind drains shall be made of rough stone thrown in without particular order, except that the larger stones should be at the bottom. The top of drain should be covered with brush or sods. Care must be taken that the drain is made large enough to answer the purpose.

81. All stone for any kind of masonry must be acceptable to the Engineer, as to quality, kind and size, and also in the manner of laying it in the work.

Crib Work.

82. The material for cribs including piles when required, shall be cedar if available. If cedar is not available, other wood acceptable to the Engineer may be used. The bark must be wholly removed.

Size Logs in Cribs.

83. In size the logs may vary from ten to sixteen inches in diameter, but they must average at least 12 inches throughout the structure. They must be cut in lengths of twelve, twenty-four or thirty-six feet. In estimating pay [81] quantities in cribs, the logs in each course and all ties shall be measured as to length only, the varying thickness not being taken into consideration. Cribs shall be used wherever the Engineer may direct, and may also be used for reflecting or changing the channels of streams.

Piles.

84. Piles shall be cut from straight live, sound and thrifty trees, free from rotten knots, shakes or splits, not less than 10 inches in diameter at the top end, not less than 14 or more than 22 inches in diameter on the butt end.

Weight Hammer.

85. Piles shall be driven with a drop hammer weighing not less than 2500# or equivalent.

Penetration.

86. Piles shall be driven to a penetration satisfactory to the Engineer.

Cutting Off.

87. Contract unit prices for driving piling shall include cutting the piles off at the elevation designated by the Engineer.

Plans.

88. Crib framing shall conform to the detail plans furnished by the Railway Company.

Rock Filling.

89. Cribs shall preferably be filled with angular rock obtained from the excavation adjacent, and care must be taken to work the largest stone to the face. If however, no suitable material is found in the excavation it shall be obtained by borrowing. No extra allowance shall be made for filling cribs, unless it be for haul, except where the Engineer deems it necessary to borrow the material, in which case the work shall be classified and paid for as borrowed excavation. [82]

(11) Revetment Work—Dykes, Etc.

Rock.

90. The rock to be furnished shall be native nigger heads, field boulders or other rock acceptable to the Engineer, or sound durable material that will not disintegrate under the action of air or water. The rock to be in pieces weighing not less than 25 pounds nor more than 200 pounds. If available, rock from excavation shall be used, in which case no extra allowance shall be made for rock in revetment work, dykes, etc.; unless it be for haul. If, however, no suitable material is found in excavation, it shall

be obtained by borrowing, in which case it will be measured and paid for per cubic yard in place.

Brush.

91. Brush to be live bar growth willow, freshly cut, not less than one-half nor more than two inches in diameter at the butt and not less than 15 nor more than 30 feet in length. Brush to be neatly bound in bundles of convenient size for one man to handle. Each bundle to be tied with No. 18 annealed wire or stout cord. Brush to be inspected and measured by the Engineer at point of destination and paid for per cord in place.

Mattresses.

92. When above bundles of brush are required by the Engineer to be woven into mattresses, such work shall be paid for by force account.

Source of Material.

93. The Contractor may use such rock and brush as is available within the limits of the Railway Company's right of way and is not required for other purposes but he shall obtain permits for obtaining brush and rock off Railway Company's right of way. [83]

(12) Pipe and Timber Culverts.

Pipe.

94. Culvert pipe shall be of concrete or corrugated iron, as specified by the Engineer.

Concrete Pipe.

95. Concrete pipe will be furnished of an oval shape in sections eight (8) feet long and have bell

and spigot joints. It shall be placed with the long diameter in a vertical position.

Corrugated Pipe.

96. Corrugated pipe will be of the round section rivetted type, sections to be connected with bolted collars. The shipping length will be varied on the request of the Contractor to suit hauling conditions. It shall be properly laid and joints bolted, and shall be stayed and crowned by wedging in struts in accordance with plans, the struts not to be removed until directed by the Engineer.

Laying and Placing Culvert Pipe.

97. Whenever it is practicable, culvert pipe shall be so placed that the bottom of the pipe will have a firm bearing on stable natural ground for its entire length. Filling underneath parts of culvert will not be permitted. Great care is necessary to have the material well compacted under and against the sides of the pipe.

Backfilling.

98. When the natural bed of culvert is in solid rock or other very hard material, same shall be excavated one foot below the culvert grade and back-filled with sand or other suitable material. Where the Engineer considers backfilling as above specified unnecessary, but hard substances are encountered, the bottom of the trench shall be rounded to fit as nearly as possible the shape of the pipe, cutting depressions for the sockets, so that the lower surface of the pipe may rest evenly and solidly from end

to end on its bed. If the filling over the pipes is to be dumped from any height, the pipes shall first be covered with suitable material to prevent breaking from the impact.

Unstable Foundations.

99. When the foundation is unstable, same shall be prepared as may be directed by the Engineer to insure against settlement or breakage of the pipes; payment for culvert excavation, backfill and any special work to be made on the basis of the contract unit prices for the classes of material handled.

Laying Culvert Pipe.

100. The pipe in culverts shall in all cases be well and carefully laid to true line and grade with proper camber to take care of any future settlement, as staked out and directed by the Engineer, and when laid, suitable material, free from stones or other hard substances shall be carefully rammed under and on the sides of the pipes, and with the small or "spigot" ends of the pipes down stream. The joints must be well and carefully entered and connected.

Material to be delivered by the Railway Company and Unloaded and hauled by the Contractor.

101. All the material required for the construction of the pipe culverts on the work embraced in this contract will be delivered by the Railway Company free of cost to the contractor on cars, at the siding on the operated line of the Railway Company nearest the site of the work, as near as practicable

to the place where such material is to be used. The Contractor shall promptly unload such material from the cars when delivered to him, and shall haul such material to the site of the structure where it is to be used. [85]

Hauling Material in Special Cases.

102. If, however, the Engineer of the Railway Company shall deem the distance excessive which said material or any part of it would have to be hauled from the said point of delivery, he may require the Contractor to unload, pile, and store said material at said point of delivery, and afterwards to reload said material on cars to be transported to the end of track or other place to be selected by the Engineer, and there to again unload said material and to haul it to the site of the structure where it is to be used. The cost of unloading such material at the place where it is first delivered to the Contractor shall be included in the price for hauling said material as provided in the contract, but for reloading, handling and again unloading material which is not hauled directly from the original point of car delivery, and which is done by orders of the Engineer, the Contractor shall receive additional compensation at the contract unit prices covering this work, or if not specifically covered in the contract it shall be paid for as Extra Work.

Handling and Care of Material.

103. All pipe shall be carefully handled and shall be unloaded from cars and wagons with ropes and skids, and not be allowed to drop to the ground or

to roll down slopes or inclines without restraint. From the time of its delivery to him by the Railway Company until it is placed in the work and accepted by the Engineer, all material shall be considered as in charge of the Contractor, and he shall be responsible for its safe keeping.

Distance Hauled.

104. The contract unit prices to be paid the Contractor for hauling material shall be based on the distance which [86] said material is required to be hauled, measured on the nearest practicable route as determined by the Engineer.

Timber Culverts.

105. Timber culverts shall conform to the detail plans furnished by the Railway Company.

106. All culvert timber shall be fir or cedar if available. It shall be free from rot or other serious defects.

Measurement of Timber.

107. All timber shall be measured by the thousand feet board measure in the finished structure.

Log Culverts.

108. Log culverts shall conform to the detail plans of the Railway Company and shall be made of sound, straight, green logs, cedar if available, from which all bark shall be removed, not less than twelve (12) inches in diameter at the small end and of nearly uniform diameter throughout each course.

Measurement Logs.

109. Material in log culverts shall be paid for by the lineal foot, and the length of the logs in the completed structure only will be considered, without regard to varying size or thickness.

Syphons.

110. If any syphons are required, it is especially to be understood that all pipes in same shall be laid according to special plans and shall be paid for at special prices. [87]

PART 2 SPECIFICATIONS FOR TUNNELS CONTENTS

Subject	Paragraph
Construction of Tunnels	1-4
Standard Plan of Single Track Tunnels	T-16-105 [88]

NORTHERN PACIFIC RAILWAY COMPANY SPECIFICATIONS FOR THE CONSTRUCTION OF TUNNELS

Lining.

1. Tunnels cut through solid rock and which, in the judgment of the Engineer, are stable, will be unlined. Tunnels which require support shall be lined with timber.

Line Grade and Cross Sections.

2. Tunnels shall be excavated to the alignment, gradients and sections shown upon the plans, or to such modifications thereof as may be directed.

Section of Tunnel.

3. The section of tunnel, when completed, must conform closely to the dimensions shown by the plans, and will be estimated and paid for by the lineal foot. No allowance will be made for material taken out beyond the limits of the proper section.

Use of Explosives.

4. Blasting must be done with all possible care so as not to damage the roof and sides, and all insecure pieces of rock beyond the standard cross section shall be removed by the Contractor. The Contractor shall not use excessive charges of explosives and charges shall, in all cases, be the minimum amount of explosives for the work to be done; and no powder or explosives shall be stored or permitted to remain in the tunnel except as are actually used in the work of blasting. The Contractor shall take down, at his own cost, all loose or shattered rock or material of any kind, [89] which in the opinion of the Engineer, is dangerous or likely to become so in the future.

Price to Include.

5. The price paid for tunnel excavation shall embrace the cost of the removal of all materials between the outer faces of the portals, and shall include the loosening, loading, transportation and placing of the material in embankments or waste

banks, as directed; it shall also include whatever materials and labor are required for temporary props, supports and scaffolding for the safe prosecution of the work, as well as all expense of keeping the tunnel ventilated and free from water.

Additional Excavation for Timbering.

6. In case the material proves of such character as to require timbering or arching inside for support, the section will be increased to the size necessary for such timbering or arching. The additional excavation will be paid for by the cubic yard, according to the theoretical section.

Kind of Timber.

7. The timber used in the tunnel will be red or yellow fir, tamarack or white or yellow pine, as may be designated by the Engineer, and may be sawed or hewed, as found most convenient or desirable.

Quality of Timber.

8. The timber used for tunnel lining shall be cut from good, sound, live, straight and close grained timber, cut free from wane edges, square and true to size ordered, and must be free from large, loose or unsound knots, shakes, splits or large pitch seams or pitch pockets and knots in clusters, and must not show a sap angle on more than one [90] edge of a stick. It must in every way be acceptable to the Engineer.

Lagging.

9. The lagging shall be in pieces at least four inches thick and five inches wide.

Protection of Timbering.

10. The Contractor will be required to protect timber, when in place, from the effects of blasting, at his own cost, by covering with slabs or otherwise, as may be convenient. He will also be required to replace, at his own cost, any timber shattered or crushed in any stage of the work, by blasting or other operations of his own.

Estimating Timber.

11. The timber used for permanent lining of the tunnel will be estimated and paid for at a price per thousand feet B. M. of timber left in the completed structure, and the price paid per thousand feet will include the total cost of all labor incidental to putting the timber and iron in place.

Back Filling.

12. The Contractor must, at his own cost, fill in with stones, closely packed, to the satisfaction of the Engineer, any cavities resulting from any cause whatever, so that the roof and sides will, in all cases where required, have a direct and firm bearing on the lagging or lining.

Temporary Timbering.

13. All temporary timbering or shoring for roof or sides that may be necessary for the safe or convenient prosecution of the work in any of its stages, will be furnished and placed by the Contractor at his own expense.

Extra Material.

14. Any material taken from outside the proper dimensions shown on the general plans furnished,

must be removed from the tunnel and roadway without expense to the Company. [91]

Timber Portals.

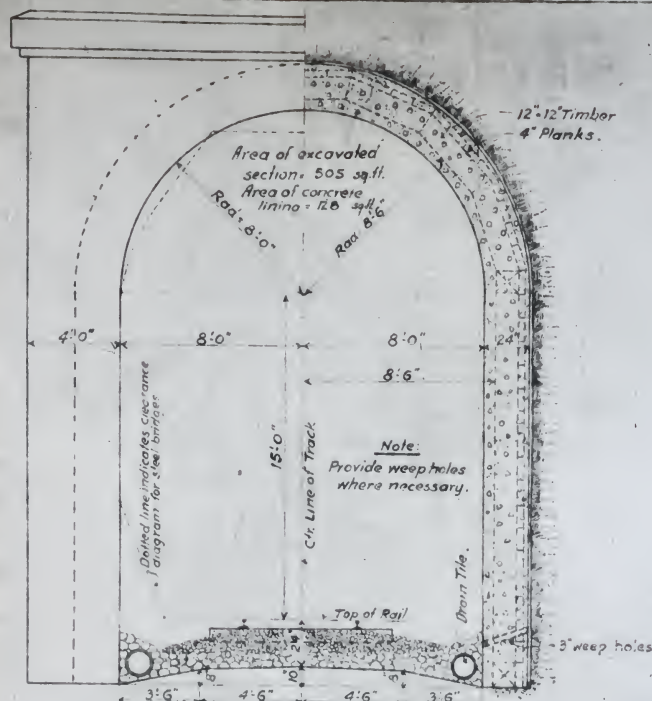
15. Should the portals of the tunnel be built of timber, it will be estimated and paid for on the same basis as timber used in the tunnel lining.

Plans to be Furnished.

16. Standard cross section of unlined tunnel on tangent will be sixteen feet wide at top of rail with circular arch sprung from a point fifteen feet above top of rail. Net cross sectional area approximately 377 square feet. Detail plans of tunnel and lining will be furnished by the Company.

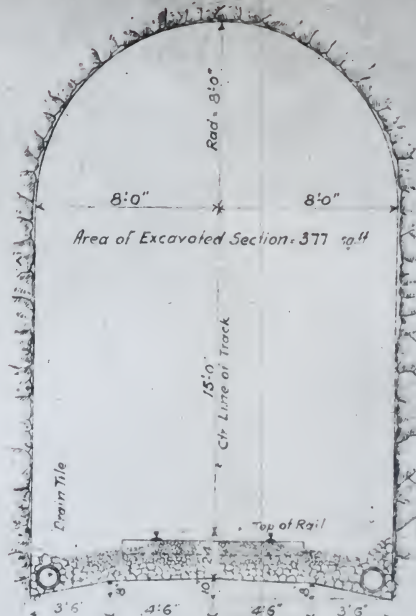
Right to Vary Dimensions.

17. The right is reserved to vary the standard dimensions of the tunnel, should the Engineer deem it advisable. [92]



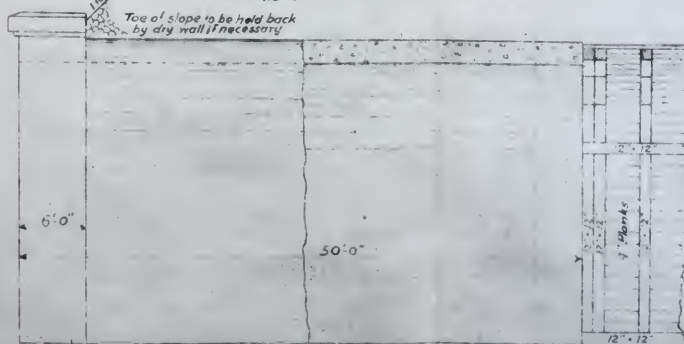
Half End View. Half Section for Soft Ground.

Scale: $\frac{1}{16}'' = 1'$



Theoretical Section for Solid Rock

Scale: $\frac{1}{16}'' = 1'$



Elevation & Longitudinal Section Scale: $\frac{1}{32}'' = 1'$

N. P. Ry.
Standard Plan
of
Single Track Tunnels.

Scale: $\frac{1}{16}'' = \frac{1}{32}'' = 1'$

Approved.

July 13, 1910.

Chief Engineer

President.

PART 3
SPECIFICATIONS FOR
BRIDGING
CONTENTS

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		[94]

During the construction of the line of railway, it may be considered advisable to aid in the progress of the work and permit the laying of track to construct all or a portion of any bridge of temporary work. The temporary work may be constructed of local timber and the specifications for "Sawed or Round Timber" or "Piling for Temporary Work" will apply to the material furnished.

Where the Contractor is required to furnish local timber, he will haul it to the bridge site and place it in the structure for the price bid.

Timber and piles furnished by the Railway Company for permanent or temporary work will be delivered by the Railway Company at their material yard and the Contractor will be paid for hauling to the bridge site. [95]

SPECIFICATIONS
FOR
THE CONSTRUCTION OF PILE AND FRAME
TRESTLES AND BRIDGE PIERS AND
ABUTMENTS.

(1) Pile and Frame Trestles
Work Included.

1. The Contractor shall build the complete trestle, or trestles, ready for the track rails, in a workmanlike manner, in strict accordance with the plans and specifications, to the satisfaction of the Engineer.

2. Bridges must be erected ahead of the track in all cases but the maximum team haul of materials shall not exceed four miles, except on written orders of the Engineer.

Material.

3. The material entering into the permanent structure shall conform to:

Specifications for Cedar Piles,

Specifications for Temporary and Foundation
Piles,

Specifications for Timber,

Specifications for Metal Fastenings,

Specifications for Galvanized Iron, M-173-C,

Specifications for Cement, E-108.

Unloading & Handling, Material.

4. The Contractor shall unload all material furnished by the Company or by the Contractor. Material shall be properly stored at least six (6) feet from the nearest rail and any material furnished by the Company, lost or damaged in handling by the Contractor during the progress of the work, [96] shall be replaced by the Contractor at his expense, unless such loss or damage is plainly the fault of the Company. Material furnished by the Company which is received before the Contractor is on the ground will, if necessary to release cars, be unloaded by the Company in the nearest available material yard, and material unloaded by the Company shall be handled from the point where it is unloaded to the site of the work by the Contractor, without additional cost to the Company. All material held on cars or received after the Contractor is on the ground, shall be unloaded promptly by the Contractor at his expense.

Rental of Equipment.

5. On the request of the Contractor, the Company will furnish equipment to the Contractor, such as flat cars, box cars, bunk cars, etc. The Contractor shall repair all damage to such equipment furnished for his use and return it in as good condition as when he received it.

Rental rates for such equipment shall be as follows:

Water Cars	\$1.00 per day
Caboose (8 wheel)	1.70 “ “
Refrigerator Cars	1.30 “ “
Box Cars	1.30 “ “
Flat Cars	1.00 “ “
Office, Bunk, Supply and Tool Cars	0.75 “ “
Plant.	

6. The Contractor shall furnish all necessary labor, tools, machinery, supplies, temporary staging and outfit required.

Driving Piles.

7. Piles shall be carefully selected to suit the place and ground where they are to be driven. When required by the Engineer, pile butts shall be banded with iron or steel for [97] driving, and the tips shod with suitable iron or steel shoes. Such shoes will be furnished by the Company.

8. Piles shall be driven to firm bearing, satisfactory to the Engineer.

9. Piles shall be driven by a steam or drop hammer. The weight of the drop hammer shall not be less than twenty-five hundred (2,500) pounds. Where soil conditions are favorable, jetting will be permitted, subject to the approval of the Engineer.

10. Batter piles shall be driven to the inclination shown by the plans.

11. Piles injured in driving, or driven out of place, shall either be pulled out or cut off and replaced by new piles.

Cutting off Piles.

12. The Contractor shall cut off files to the elevation given by the Engineer, without cost to the

Company. Piles shall be cut off square and trimmed so as not to leave any horizontal projection outside of the cap.

Framing and Placing Sawed Timber.

13. Framing shall be accurately fitted. No blocking or shimming will be allowed in making joints. Timbers shall be cut off with the saw. The use of an axe in cutting off timbers will not be permitted.

14. Caps and sills shall be sized and brought to a uniform thickness and even bearing on piles or posts. The side with most sap shall be placed downward.

15. Posts shall be sawed to proper length for their [98] position (vertical or batter), and to even bearing on cap and sill.

16. Sash and sway bracing shall be properly framed and securely fastened to piles or posts. When necessary, on account of the variation in size of piles of a bent, filling pieces shall be used or piles dapped as directed by the Engineer to permit proper alignment of the bracing. Longitudinal diagonal braces shall be properly framed and securely fastened to piles or posts. Girts shall be properly framed and securely fastened to caps, sub-sills, intermediate sills, posts or piles, as called for on the plans.

17. Stringers shall be sized to a uniform depth at supports. The edges with most sap shall be placed downward.

18. Ties will be sized to a uniform thickness at the mill and shall be placed with the rough side

upward. They shall be spaced regularly and cut to even length and line, as called for on the plans.

Guard Timbers.

19. Guard timbers shall be framed, laid to line and to a uniform top surface. They shall be firmly fastened to the ties, as called for on the plans.

20. Bulkheads shall be of sufficient dimensions to keep the embankment clear of the caps, stringers and ties, at the end bents of the trestle. The projecting ends of the bulkheads shall be sawed off to conform to the slope of the embankment. [99]

Framing & Placing Round Timber.

21. Temporary frame trestles constructed of round timbers may be used at locations designated by the Engineer, in order to lay track in advance of the permanent bridge construction. The framing and placing shall be made in a manner which will provide a stable and rigid structure.

22. Round timbers used as posts in permanent trestles shall be accurately framed and fastenings placed to conform to the Railway Company's plan of frame trestles.

Metal Fastenings.

23. Holes shall be bored for all bolts and dowels. The size of the holes shall be one sixteenth ($1/16$) inch less than the diameter of bolt or dowel to be placed. For drift bolts the depth of the hole shall be one inch less than the length of the bolt.

24. All fastenings shall be placed as called for on the plans.

Fireproofing.

25. Galvanized sheets shall be placed as called for on the plans.

Measurement of Timber.

26. All timber shall be measured by the thousand feet board measure for sawed timber and per lineal foot of log for round timber in the finished structure.

Excavation.

27. Excavation for frame trestle bents will be paid for as foundation excavation, as shown in the Company's specification E-109, "For the Construction of Bridge Masonry and Retaining Walls".

Concrete Pedestals.

28. The construction of concrete pedestals shall conform to the Railway Company specification No. E-109, "For the Construction of Bridge Masonry and Retaining Walls". [100]

Rubble Masonry, Walls, Pedestals & Piers.

29. Rubble Masonry shall be composed of stones of proper size and thickness for the dimensions of the work. They shall be of fair shape and spalled to provide a good even bearing in the wall. All stones shall be laid with full mortar beds and joints. All exposed faces shall be pointed. They shall be laid with headers properly spaced to make a good, substantial wall. No stones less than six inches in thickness shall be used and generally not less than eight inches. The tops of walls, pedestals or piers shall be finished to a true level.

Pier Cribs.

30. The material of which the cribs required for support and protection of timber bents or piers shall be built, will be cedar. The bark shall be removed.

31. The size of the logs may vary from ten to sixteen inches in diameter, but they must average at least twelve inches throughout the structure. They shall be cut to lengths shown on the plans.

32. In estimating the logs in cribs, each course and all ties shall be measured as to length only, the varying thickness not being taken into consideration.

33. Crib framing shall conform to the detail plans furnished by the Railway Company.

34. Cribs shall be filled with angular rock and care shall be taken to work the largest stones to the face. Pier crib filling will be paid for by the cubic yard measured in place. [101]

(2) Bridge Piers and Abutments

35. The Construction of piers and abutments shall conform to the Railway Company specification No. E-109. "For the Construction of Bridge Masonry and Retaining Walls". [102]

NORTHERN PACIFIC RAILWAY COMPANY SPECIFICATION FOR METAL FASTENINGS USED IN PILE AND FRAME TRESTLES

(1) Material

Wrought Iron.

1. Wrought iron shall be double rolled, tough, fibrous and uniform in character. It shall be

thoroughly welded in rolling and be free from surface defects. When tested in specimens of the form of Fig. 1, or in full sized pieces of the same length, it shall show an ultimate strength of at least 50,000 pounds per square inch, an elongation of 18 percent in 8 inches, with fracture wholly fibrous. Specimens shall bend cold, with the fiber, through 135 degrees, without sign of fracture, around a pin the diameter of which is not over twice the thickness of the piece tested. When nicked and bent, the fracture shall show at least 90 percent fibrous.

Steel.

2. Steel shall be made by the open hearth process and shall be of uniform quality. It shall contain not more than 0.05 percent sulphur. If made by the acid process, it shall contain not more than 0.06 percent phosphorous; and if made by the basic process, not more than 0.04 percent phosphorous. When tested in specimens of the form of Fig. 1, or full sized pieces of the same length, it shall have a desired ultimate tensile strength of 60,000 pounds per square inch. [103]

within 5000 pounds of desired ultimate. It shall have a minimum percentage of elongation in 8 inches of

1,500,000 and shall bend cold without fracture 180 degrees flat. The fracture for tensile tests shall be silky.

CAST IRON

(3) Except where chilled iron is specified, castings shall be made of tough gray iron, with sulphur not over 0.10 per cent. They shall be true to pattern, out of wind and free from flaws and excessive shrinkage. If tests are demanded, they shall be made on the "Arbitration Bar" of the American Society for Testing Materials, which is a round bar $1\frac{1}{4}$ inches in diameter and 15 inches long. The transverse test shall be made on a supported length of 12 inches, with load at middle. The minimum breaking load so applied shall be 2900 pounds, with a deflection of at least $\frac{1}{10}$ inch before rupture. [104]

(2) Workmanship

Bolts.

4. Bolts shall be of wrought iron or steel, made with square heads, standard size, the length of thread to be $2\frac{1}{2}$ times the diameter of bolt. The nuts shall be made square, standard size, with thread fitting closely the thread of bolt. Threads shall be cut according to U. S. standards.

Drift Bolts.

5. Drift bolts shall be of wrought iron or steel, without head, pointed, as called for on plans.

Spikes.

6. Spikes shall be of wrought iron or steel, square or round, as called for on the plans. Steel wire spikes, when used for spiking planking, shall not be used in lengths more than 6 inches; if greater lengths are required, wrought or steel spikes shall be used.

Packing Spools or Separators.

7. Packing spools or separators shall be of cast iron, made to size and shape called for on plans. The diameter of hole shall be $\frac{1}{8}$ inch larger than diameter of packing bolts.

Cast Washers.

8. Cast washers shall be of cast iron. The diameter shall be not less than $3\frac{1}{2}$ times the diameter of bolt for which it is used, and its thickness equal to the diameter of bolt. The diameter of hole shall be $\frac{1}{8}$ inch larger than the diameter of the bolt.

Wrought Washers.

9. Wrought washers shall be of wrought iron or steel, the diameter shall be not less than $3\frac{1}{2}$ times the diameter of bolt for which it is used, and not less than $\frac{1}{4}$ inch thick. The hole shall be $\frac{1}{8}$ inch larger than the diameter of the bolt. [105]

NORTHERN PACIFIC RAILWAY COMPANY SPECIFICATIONS FOR TIMBER OF PILE AND FRAME TRESTLES

(1) Sawed Timber

Bridge Stringers.

1. Stringers shall be cut from good, sound, live, straight and close grained timber, cut free from

wane edges, square and true to sizes ordered, and must be free from splits, shakes and other defects, except pitch seams four to six inches in length, and sound, live knots, not more than two inches in diameter, and fibre of which must be interwoven with the fibre of the wood surrounding them. A piece with knots in clusters will not be accepted. To be inspected before loading.

Other Bridge Timber and Ties.

2. Timber shall be cut from good, sound, live, straight and close grained timber, cut free from wane edges, square and true to sizes ordered, and must be free from large, loose or unsound knots, shakes, splits, or large pitch seams or pitch pockets and knots in clusters, and must not show a sap angle on more than one edge of a stick. Subject to inspection before loading. Surfacing of bridge ties must be opposite the heart.

(2) Round Timber

Posts.

3. Posts in permanent trestles shall be of cedar and shall conform to the specifications for "Cedar Piles".

4. Posts in temporary trestles shall be of any sound timber, and shall conform to the specifications for "Tem- [106] porary and Foundation Piles".

Caps and Sills.

5. Timber shall be of Fir, Tamarack, Pine or other suitable wood.

6. Timber shall be cut from live, sound trees, free from defects, such as injurious ring shakes,

large and unsound or loose knots, decay or other defects which may materially impair their strength.

7. Each stick shall be straight, free from short bends and a line drawn from the center of each end shall not fall more than three inches from the center line of the stick.

8. The minimum diameter at the small end of the stick shall be not less than fourteen inches and the diameter at the large end shall be not less than nineteen inches or more than twenty-two inches.

[107]

NORTHERN PACIFIC RAILWAY COMPANY
SPECIFICATION
FOR
PILING FOR TEMPORARY AND
FOUNDATION WORK

(1) Piles shall be of White Oak, Red Oak, Cedar, Fir, Tamarack, Sycamore, Gum, Maple, Elm, Hickory, Norway Pine, or any sound timber that will stand driving.

(2) Piles shall be cut from live, sound trees, free from defects, such as injurious ring shakes, large and unsound or loose knots, decay or other defects which may materially impair their strength.

(3) Piles must be butt cut above the ground swell and have a uniform taper from butt to tip. Short bends will not be allowed. A line drawn from the center of the butt to the center of the tip shall lie within the body of the pile.

(4) Unless otherwise specified, piles shall be peeled.

(5) The minimum diameter at the tips of piles shall be 9 inches for lengths not exceeding 40 feet and 8 inches for lengths over 40 feet.

6. The diameter at the butt shall not be less than 14 inches and shall not exceed 22 inches. [108]

NORTHERN PACIFIC RAILWAY COMPANY
SPECIFICATION
FOR
CEDAR PILES.

(1) Piles shall be of Western Red Cedar unless otherwise specified by the Railroad Company.

(2) Piles shall be cut from live, sound trees, free from defects, such as injurious ring shakes, large and unsound or loose knots, decay or other defects, which may materially impair their strength or durability.

(3) Piles must be butt cut above the ground swell and have a uniform taper from butt to tip. Short bends will not be allowed. A line drawn from the center of the butt to the center of the tip shall lie within the body of the pile.

(4) Unless otherwise allowed, piles shall be cut when sap is down. Piles shall be peeled soon after cutting. All knots shall be trimmed close to the body of the pile. The ends shall be sawed square and finished in a workmanlike manner.

(5) Piles 40 feet or less in length shall be not less than 10 inches in diameter at narrowest part of top.

(6) Piles over 40 feet in length shall be not less than 9 inches in diameter at narrowest part of top.

(7) All piles shall be not less than 14 inches in diameter at the butt and not over 22 inches in diameter at widest part. [109]

SPECIFICATION No. E-109
FOR THE CONSTRUCTION OF BRIDGE
MASONRY AND RETAINING WALLS.

Printed Form dated 6-6-22.

No. copy available. [110]

PART 4
SPECIFICATIONS FOR
TRACKLAYING AND SURFACING.
CONTENTS.

Section	Subject	Paragraph
1	Tracklaying	1-18
2	Earth Surfacing	19-23
3	Ballasting	24-36
		[111]

SPECIFICATIONS
FOR
TRACKLAYING, SURFACING AND
BALLASTING.

(1) Tracklaying.

Description of Work.

1. Tracklaying shall include all the work of laying the main track, sidings, or other permanent tracks, frogs, switches, rail braces, tie plates, crossings, etc., laying and spiking the plank of road crossings wherever required, and trimming down or filling up the surface of the roadbed to bring it to a true grade. Also setting all track markers and signs.

Unloading and Handling Material.

2. The Contractor shall unload all material furnished by the Company or by the Contractor. Material shall be properly stored at least six (6) feet from the nearest rail and any material furnished by the Company, lost or damaged in handling by the Contractor during the progress of the work, shall be replaced by the Contractor at his expense, unless such loss or damage is plainly the fault of the Company. Material furnished by the Company which is received before the Contractor is on the ground will, if necessary to release cars, be unloaded by the Company in the nearest available material yard, and material unloaded by the Company shall be handled from the point where it is unloaded to the site of the work by the Contractor, without additional cost to the Company. All material held on cars or received after the Contractor is on the ground, shall be unloaded promptly by the Contractor at his expense. [112]

Train Service.

3. The Company will furnish, without cost to the Contractor, such engine and work train service as shall, in the judgment of the Engineer, be required for hauling ballast, including spotting engine at the pit. All other work train service for track work, rail laying, etc., shall be furnished at the expense of the Contractor.

Ballast Equipment.

4. The Company will furnish, without cost to the Contractor, rolling equipment, such as ballast cars, balast spreader and Lidgerwoods as in the judgment

of the Engineer shall be necessary. The Contractor shall make field repairs at his expense and at the completion of the work, he shall return such cars to the Company in as good condition as when he received them.

Rental Or Equipment.

5. On the request of the Contractor the Company will furnish equipment to the Contractor, such as flat cars, box cars, bunk cars, etc. The Contractor shall repair all damage to such equipment furnished for his use and return it in as good condition as when he received it. Rental rates for such equipment shall be as follows:

Water Cars	\$1.00 per day
Caboose (8 wheel)	1.70 per day
Refrigerator Cars	1.30 per day
Box Cars	1.30 per day
Flat Cars	1.00 per day
Office, Bunk, Supply and Tool Cars	0.75 per day

6. Contractor shall handle with his own work train, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service of other Contractors. The specified contract price [113] per car mile to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company.

7. In addition to Contractor's own material and that covered by his contract, Contractor shall handle as required, material from operated line set out track to material yard tracks for unloading. The specified contract price per car to include all necessary switching and spotting.

Lining and Spacing.

8. Center stakes for tracklaying shall be set by the Engineer two hundred (200) feet apart on tangents, and one hundred (100) feet or less apart on curves. Cross ties shall be laid to a line with the north or east end four (4) feet from the center of the track. Selected ties shall be used for joints spaced to fit the angle bars. Generally eighteen (18) ties will be used to a thirty-three foot rail, but this may be modified at the discretion of the Engineer. Whenever the surface of a tie is in wind, it must be adzed so as to give both rails a full bearing across the face of the tie. Unnecessary adzing of creosoted ties is prohibited.

Broken Joints.

9. Track shall be laid with broken joints; the joints on one side not to be allowed to run more than twelve inches one way or the other from the center of the rail on the opposite side. Rail joints should not be located nearer than five feet from end of bridges. Rail should not be cut to accomplish this, but short lengths used. [114]

Expansion Shims.

10. Proper opening must be allowed for expansion and contraction, iron shims being used and left

in the joints until all danger of driving the rail is over.

11. Expansion to be allowed for according to temperature:—

Over 100 degrees rails shall be laid close without bumping.

1/16" for +75 degrees to +100 degrees.

1/8" for +50 degrees to + 75 degrees.

3/16" for +25 degrees to + 50 degrees.

1/4" for 0 degrees to + 25 degrees.

5/16" for -20 degrees to zero.

Gauging Track Curving Rail—Use of Short Rails.

12. The rails shall be laid accurately to standard gauge 4'-8 1/2" on tangents, and on curves up to and including eight degrees; for curves sharper than eight degrees, the gauge to be widened at the rate of 1/16" for each degree of curve above eight degrees. On curves three degrees and over, the rails shall be correctly curved by the Contractor so as to fit true to line. Short rails shall be used for the inside of curves, as required, to keep the joints within twelve inches of the center of the opposite rail.

Tie Plates.

13. Tie plates shall be furnished by the Company as may be considered necessary by the Engineer, and shall be placed by the Contractor. They shall be placed as the tracklaying progresses in correct position on the tie, true to gauge, square with the rail, and after they have been brought to a full

and firm bearing on the tie, the spikes must be gone over again and driven home.

Rail Anchors.

14. Rail anchors will be furnished by the Company and shall be applied by the Contractor at the points and in the quantities specified by the Engineer. Anchors shall be set [115] firmly against the ties in the direction of creeping and care shall be used to avoid over driving or otherwise damaging the anchors in their application.

Angle Bars.

15. The angle bars shall be firmly secured in place by the full number of bolts with nuts turned up tight; bolts to be staggered, heads placed inside and outside alternately. After the track has been in service and before the acceptance of same, all bolts must be gone over again and have nuts turned up tight.

Spiking.

16. Rails shall be fully spiked throughout as laid; spikes to be set vertically and driven home. The two inside spikes shall be driven near, but not less than two (2) inches from the west edge of the tie and the two (2) outside spikes shall be driven near, but not less than two (2) inches from the east edge of tie. The angle bars shall be spiked in the slots. Tracks shall be gauged as spikes are driven at joints, centers and quarters, and no excuse shall be taken for incorrect gauging. On bridges the track shall be accurately lined up before being spiked and spikes shall be driven in every other bridge tie only. No slot spiking will be permitted on bridges.

Switches.

17. Switches shall be put in according to stakes set by the Engineer and according to plans furnished.

Crossings.

18. Road crossing planks shall be put in at the time track is laid, necessary plank and boat spikes for same being furnished by the Company. Track spikes shall not be used in fastening down crossing planks. No extra price shall be [116] paid for putting in road crossing plank, the expense of same being included in the price paid per mile for track-laying.

Payments.

19. Tracklaying shall be estimated and paid for by the track mile. Side tracks shall be estimated from headblock to headblock of switch, and paid for at the same price as main track. Only such sidings, spurs and material yard tracks as are shown on plans or covered by written orders of the Engineer shall be paid for. Side tracks or spurs put in by the Contractor on his own initiative shall not be paid for, and shall be removed by the Contractor on the completion of the work without expense to the Company.

Contractor's Liability.

20. Contractor shall be held responsible for all material furnished for the work, and all surplus and scattered material must be picked up as the work progresses and loaded on cars.

Miscellaneous Work.

21. All crossing, flanger, station, tank and other signs, mile posts and extra rail rests, and clearance posts, are to be set by the Contractor as directed by the Engineer, and shall be considered a part of the tracklaying and surfacing; and the expense of setting will be held to be included in the price paid for tracklaying.

(2) Earth Surfacing.

Running Surface.

22. Running surface consists of putting track in condition to preserve the rail, fastenings and expansion from injury by the passing of construction or other trains until such time as ballasting is done. Such surfacing of track shall be done by casting material from the sides of cuts or [117] embankments, or by using push cars, as directed by the Engineer. Work of this kind shall be done without injury to the roadbed. Running surface shall be made and maintained by the Contractor without expense to the Company.

Full Surface.

23. Full earth surfacing, as may be directed by the Engineer, shall consist of full tamping, filling between all ties and filling and rounding center of track with material from sides of track or elsewhere as may be provided.

Finished Grade—Dressing Slopes.

24. Stakes will be set for the finished grade by the Engineer, the tops of the stakes to be the top

of the rail after surfacing is completed, and the work of surfacing shall be done in strict accordance with such stakes. The track shall be raised to final grade as indicated by the surfacing stakes set by the Engineer, and all ties shall be well bedded and tamped. Particular attention shall be paid to this matter and no track shall be accepted unless thoroughly tamped. After tamping, the track shall be filled in and roadbed finished off according to Standard Plan T-16-101 furnished by the Engineer, and all slopes neatly dressed.

Ditches.

25. All ditches shall be left clear and free, opened and extended so as to allow water at all times to flow freely away from the roadbed, and special care must be taken that side ditches in cuts are left unobstructed.

Elevation Outer Rail.

26. On curves, the outer rail shall be elevated as directed by the Engineer, the elevation to be carried out on tangents at both ends, where necessary, as directed by the Engineer. On all other portions of tangents, both rails shall [118] be brought to the same level. The track shall all be well lined and have a smooth and even surface and shall be kept in that condition until accepted by the Engineer.

(3) Ballasting.

Description.

27. Ballasting shall consist of full tamping, filling between all ties, and levelling and sloping with material taken from pits provided by the Company.

Side Surfacing.

28. When material of which roadbed is made is suitable for ballast, the track shall be surfaced from the sides, otherwise the material shall be hauled by the Contractor as specified in Paragraph 3 of this section, in which case it will be classified as ballast. Material for filling or ballasting shall not be taken from the slopes of embankments.

Handling and Hauling.

29. The Contractor shall load, haul, unload and spread the ballast; and place same under the track and finish to standard section. Amount of lift to be as directed by the Engineer.

Pit Operations.

30. The expense of cutting steam shovel into ballast pit, shifting steam shovel from one pit to another pit and for all shifting of track in ballast pit, shall be borne by the Contractor, the Company to pay for the first laying of track in ballast pits.

Finished Section.

31. Ballast contour and ditches must conform to the standard plans of the Company.

Ditches.

32. All road and surface ditches shall be left clear and free, so as to conduct water freely and quickly from the roadbed; and all side ditches must be left unobstructed. [119] The side slopes and ditches shall be left neat and smooth, and free from all rubbish, material and obstructions.

Running Surface Damaged Rails.

33. All new track must be brought to surface and tamped up before it is run over. Rails that are damaged by reason of neglect on the part of the Contractor to comply with these requirements will be replaced at his expense.

Completion Maintenance Acceptance.

34. When the ballasting is completed, the track shall be in perfect line, surface and gauge, and shall be so mainained by the Contractor until it is accepted by the Company for operation. This contemplates a second adjustment of the track to line and grade, after it has settled under traffic. The line will not be accepted until it is fully completed.

Ballast Grade.

35. Stakes shall be set for the ballasting by the Engineer, the top of the stakes to be the top of the rail after ballasting is completed, and the work of ballasting shall be done in strict accordance with said stakes.

Measurement Limits of Haul.

36. Ballast shall be measured in excavation; the Engineer will designate the limits to which the ballast from each pit shall be hauled.

Distribution, Surplus Material and Waste.

37. The Contractor shall be responsible for the proper distribution of ballast material, sufficient to lift the track according to stakes, and dress same according to standard plan, and all surplus ballast material in one place shall be picked up and used to fill out a deficiency in other places. Care shall be

taken by the Contractor that ballast is not wasted on the sides of the roadbed, and in the event that any is so wasted, it will not be paid for by the Company. [120]

Tamping Finishing and Dressing.

38. All ties shall be well bedded and tamped, the centers loosely tamped. Particular attention must be paid to this matter and no track will be accepted unless thoroughly tamped. After tamping, the track shall be filled in and roadbed finished off according to standard plan, and all slopes neatly dressed.

Elevation Outer Rail.

39. On curves, the outer rail shall be elevated as directed by the Engineer, the elevation to be carried out on tangents at both ends, where necessary, as directed by the Engineer. On all other portions of tangents, both rails must be brought to the same level. The track shall be well lined and have a smooth and even surface, and shall be kept in that condition until accepted by the Engineer. [121]

NORTHERN PACIFIC RAILWAY COMPANY PROPOSAL

For Clearing, Grubbing, Grading, Culverts, Bridging, Tracklaying and Ballasting on the proposed branch line extending from Oro Fino to Headquarters.

Location, Oro Fino, Clearwater County Idaho
Division Idaho.

The undersigned hereby propose, and, if this proposal is accepted, agree to enter into a written con-

tract, if required, with the Northern Pacific Railway Company, to do all the work for which prices are named herein, according to the plans and directions of the Engineer for said Company, in conformity with the specifications made for said work and attached hereto, upon the terms and conditions of the contract to be prepared therefor, and within the time specified.

The following prices include all labor, material and equipment of every description necessary for the construction of the work, with the exception of material entering into the permanent construction, which will be furnished by the Railway Company, except as otherwise noted.

(1) Heavy Clearing, per acre	\$165.00
(2) Clearing sage brush, greasewood and other brush, per acre	\$ 45.00
(3) Cutting isolated and dangerous trees, each	\$ 3.00
(4) Grubbing, per acre	\$180.00
(5) Common Excavation, per Cu. Yd.	\$ 0.38
(6) Hard Pan, per Cu. Yd.	\$ 0.55
(7) Loose Rock, per Cu. Yd.	\$ 0.65
	[122]
(8) Solid Rock, per Cu. Yd.	\$ 0.99
(9) Solid Rock Borrow, per Cu. Yd.	\$ 0.99
(10) Overhaul, per Cu. Yd. per each 100-ft. beyond 500 ft. free haul.	\$ 0.02
(11) Corduroy, in place, per Cu. Yd.	\$ 3.00
(12) Loose Riprap, in place, from borrow, per Cu. Yd.	\$ 1.85

- (13) Loose Riprap, in place, from Excavation, per Cu. Yd. \$ 0.80
- (14) Hand Placed Riprap, in place, including the paving of culverts, from borrow, per Cu. Yd. \$ 3.50
- (15) Hand Placed riprap, in place, including the paving of culverts, from excavation, per Cu. Yd. \$ 2.50
- (16) Dry Wall protection work, in place at culvert ends, etc., from borrow, per Cu. Yd. \$ 7.00
- (17) Dry Wall protection work, in place at culvert ends, etc., from excavation, per Cu. Yd. \$ 6.00
- (18) Blind Drains, in place, including brush top, per Cu. Yd. \$ 3.50
- (19) Driving Piles in protection work, per lineal foot above cut-off \$ 0.18
(Ry. Co. to furnish piles)
- (20) Driving piles in protection work, per lineal foot below cut-off \$ 0.32
(Ry. Co. to furnish piles)
- (21) Driving piles in protection work, per lineal foot above cut-off \$ 0.32
(Contractor to furnish cedar piles at the site of structure).
- (22) Driving piles in protection work, per lineal foot below cut-off \$ 0.44
(Contractor to furnish cedar piles at the site of structure)

- (23) Furnishing, hauling and placing local round cedar logs in cribs and bulkheads for protection work, and placing metal fastenings, per lineal foot of logs placed \$ 0.32
(Railway Company to furnish metal fastenings) [123]
- (24) Furnishing, hauling and placing local round pine logs in cribs and bulkheads for protection work, and placing metal fastenings, per lineal foot of logs placed \$ 0.30
(Railway Company to furnish metal fastenings)
- (25) Furnishing and placing rock in revetments and dykes, etc., per cubic yard in place \$ 2.50
- (26) Furnishing, hauling and placing brush, per cord in place \$ 16.00
- (27) Placing sawed timber in culverts, including metal fastenings, per thousand F.B.M. in place \$ 13.50
(Railway Company to furnish timber and metal fastenings)
- (28) Furnishing, hauling and placing sawed local timber in culverts, and placing metal fastenings, per thousand F.B.M. in place \$ 38.00
(Railway Company to furnish metal fastenings)

- | | |
|---|---------|
| (29) Furnishing, hauling and placing logs in culverts, and placing metal fastenings, per lineal foot of logs in place | \$ 0.28 |
| (Railway Company to furnish metal fastenings) | |
| (30) Placing 24" concrete culvert pipe, per lineal foot of culvert in place | \$ 1.10 |
| (Railway Company to furnish pipe) | |
| (31) Placing 36" concrete culvert pipe, per lineal foot of culvert in place | \$ 1.80 |
| (Railway Company to furnish pipe) | |
| (32) Placing 18" corrugated iron culvert pipe, per lineal foot of culvert in place | \$ 0.60 |
| (Railway Company to furnish pipe) | |
| (33) Placing 24" corrugated iron culvert pipe, per lineal foot of culvert in place | \$ 0.80 |
| (Railway Company to furnish pipe) | |
| (34) Placing 36" corrugated iron culvert pipe, per lineal foot of culvert in place | \$ 1.10 |
| (Railway Company to furnish pipe) | |
| (35) Team Haul for concrete pipe, per ton per mile | \$ 0.65 |
| (36) Team Haul for corrugated iron pipe, per ton per mile | \$ 0.85 |
| [124] | |
| (37) Hauling piles furnished by the Company, per lineal foot per mile | \$ 0.02 |
| (38) Hauling Timber furnished by the Company, per thousand F.B.M. per mile | \$ 0.85 |
| (39) Hauling metal fastenings, per ton per mile | \$ 0.65 |

- (40) Hauling galvanized iron, per ton per mile \$ 0.65
- (41) Hauling cement, per sack per mile \$ 0.04
- (42) Driving piles in trestles bents, per lineal foot above cut-off \$ 0.18
(Railway Company to furnish piles)
- (43) Driving piles in trestle bents, per lineal foot below cut-off \$ 0.32
(Railway Company to furnish piles)
- (44) Driving piles in trestle bents, per lineal foot above cut-off \$ 0.32
(Contractor to furnish cedar piles at the site of structure)
- (45) Driving piles in trestle bents, per lineal foot below cut-off \$ 0.44
(Contractor to furnish cedar piles at the site of structure)
- (46) Driving piles in trestle bents, per lineal foot above cut-off \$ 0.32
(Contractor to furnish piles for temporary work at site of structure)
- (47) Driving piles in trestle bents, per lineal foot below cut-off \$ 0.44
(Contractor to furnish piles for temporary work at site of structure)
- (48) Placing sawed timber in pile or frame trestles, including metal fastenings, per thousand F.B.M. in place \$ 16.50
(Railway Company to furnish timber and metal fastenings)

- (49) Furnishing, hauling and placing sawed local timber in pile or frame trestles, and placing metal fastenings, per thousand F.B.M. in place \$ 43.00
(Railway Company to furnish metal fastenings) [125]
- (50) Furnishing, hauling and placing round local timber in frame trestles, and placing metal fastenings, per thousand F.B.M. in place \$ 0.50
(Railway Company to furnish metal fastenings)
- (51) Furnishing, hauling and placing local round cedar timber in frame trestles, and placing metal fastenings, per thousand F.B.M. in place \$ 0.53
(Railway Company to furnish metal fastenings)
- (52) Placing galvanized iron fire protection on bridges, per pound in place \$ 0.025
(Railway Company to furnish galvanized iron)
- (53) Furnishing, hauling and placing local round cedar logs in pier cribs, and placing metal fastenings, per lineal foot of logs placed \$ 0.32
(Railway Company to furnish metal fastenings)
- (54) Furnishing, hauling and placing local round pine logs in pier cribs, and plac-

ing metal fastenings, per lineal foot of
logs placed \$ 0.30
(Railway Company to furnish metal
fastenings)

(55) Furnishing and placing rock in pier
cribs, per cubic yard of rock in place \$ 2.50

(56) Dry foundation excavation, common
material, per cubic yard \$ 0.60

(57) Dry foundation excavation, loose rock,
per cubic yard \$ 1.20

(58) Dry foundation excavation, solid rock,
per cubic yard \$ 2.00

(59) Wet foundation excavation, common
material, per cubic yard \$ 2.50

(60) Wet foundation excavation, loose rock,
per cubic yard \$ 3.50

(61) Wet foundation excavation, solid rock,
per cubic yard \$ 5.00

(62) Furnishing materials and placing con-
crete 1-3-5 mixture in pedestals for sup-
port of frame bents, per cubic yard \$ 22.50

(63) Furnishing materials and placing con-
crete 1-3-5 mixture in bridge piers,
per cubic yard \$ 20.00

(63a) Hauling concrete aggregate per ton
per mile \$ 0.60

[126]

(64) Furnishing materials and placing rub-
ble masonry in pedestals and piers, per
cubic yard \$ 17.50

- (65) Tracklaying, including running surface, unloading and reloading material at material yard, transporting it to the front, curving rails, placing road crossing planks, track markers and signs and reloading all surplus track material, per mile of track \$1400.00
(Railway Company to furnish all material)
- (66) Switches complete in place, each \$120.00
(Railway Company to furnish material)
- (67) Placing tie plates, per mile of track \$250.00
(Railway Company to furnish material)
- (68) Application of rail anchors, per anchor in place \$ 0.03
(Railway Company to furnish material)
- (69) Full earth surface, per mile of track \$1200.00
- (70) Loading, unloading and placing ballast under track and finishing to section when total lift is 6" or less, per cubic yard \$ 0.80
- (71) Loading, unloading and placing ballast under track and finishing to section when total lift is over 8", per cubic yard, said unit price to apply to the entire amount of ballast placed \$ 0.80

- (72) Handling prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in the service of other contractors, to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company, per car mile \$ 1.00
- (73) Handling cars of material in addition to Contractor's own material and that covered by his contract, as required, from operated line set out track to material yard tracks for unloading, including all necessary switching and spotting, per car \$ 10.00

[127]

Oro Fino Branch Construction

Supplementary Proposal Covering Tunnels.

- (74) Tunnel excavation for a net section of 377 square feet, including 500 foot free haul of excavated material, per lineal foot of tunnel \$ 95.00
- (75) Tunnel excavation outside of 377 square feet net section, including 500 foot free haul of excavated materials, per cubic yard 4.50
- (76) Placing sawed timber in permanent tunnel linings, including metal fasten-

ings, per thousand F. B. M. in place	22.50
(Railway company to furnish timber and metal fastenings)	
(77) Furnishing, hauling and placing sawed local timber and metal fastenings in permanent tunnel linings, per thousand F. B. M. in place	48.00
(78) Furnishing, hauling and placing hewed local timber and metal fastenings in permanent tunnel linings, per thousand F. B. M. in place	56.00
	[128]

Transportation.

The Railway Company will furnish free transportation over the line of the Northern Pacific Railway Company, subject to the review and instructions of the Chief Engineer as to the necessity for and proper use of same, as follows:—

Passenger Transportation: (To be used only when traveling on business in connection with this contract.)

1. For one member and one superintendent of the Contractor's firm or corporation, passes good on Northern Pacific System.

2. For subcontractors from any point on Northern Pacific System to the Northern Pacific Railway station nearest the site of the work and return.

3. For foremen and laborers from any point on Northern Pacific System to the Northern Pacific Railway station nearest the site of the work.

4. Return transportation will be furnished to such foreman and skilled labor as may remain until completion of the class of work on which employed, but no free return transportation will be granted for common laborers.

Freight Transportation.

1. For all material to be used in the work (except as hereinafter provided) from any point on Northern Pacific System to the Northern Pacific Railway station or spur track nearest the site of the work.

2. For tools, outfit and equipment used in the work from any point on Northern Pacific System to the Northern Pacific Railway station or spur track nearest the site of the work and return to point from which same were originally shipped to the work, or to any [129] intermediate point on the line of the Railway Company. The right to such free transportation must be exercised within ninety days after the date of completion of the work, after which time no free return transportation will be furnished.

3. The Contractor shall pay full tariff rates on all coal, boarding and commissary supplies, hay and grain, lumber for camps, powder and explosives, and shall buy all materials, if possible, at points which will permit the Company to receive the haul on same, routing same via the lines of the Company and its connecting lines.

Transportation—General.

Exceptions may be made in the above stipulations covering passenger and freight transporta-

tion, and additional or other transportation may be furnished, as in the discretion of the Chief Engineer may be found necessary for the proper handling of the work.

Free Transportation will be required from the following points: Equipment from St. Paul, Spokane-Seattle No. of Carloads 50 Men from Portland, St. Paul, Spokane, Seattle No. of men 2500.

The work is to be commenced immediately after the award of contract and completed as follows:

The Grading, Bridging and Tracklaying are to be completed on or before June 1st, 1927.

All work is to be completed on or before September 1st, 1927.

The Railway Company reserves the right to reject any and all bids, and, at its option, to require a satisfactory bond from the Contractor for the faithful performance of the work. [130]

All proposals to be sealed, marked "Proposal for the Construction of the Oro Fino Branch," and addressed to the Chief Engineer of the Northern Pacific Railway Company, Saint Paul, Minnesota.

Bids will be received until October 12th, 1926.

Signature of Proposer

TWOHY BROTHERS COMPANY

By JAMES TWOHY.

Address

Old National Bank Bldg., Spokane, Wash.

Date October 12, 1925. [131]

EXHIBIT "B"

Supplemental agreement made this 26th day of April, 1927, between Northern Pacific Railway Company, hereinafter called the "Company," and Twohy Brothers Company, of Spokane, Washington, hereinafter called the "Contractor":

The parties hereto are parties to an agreement dated the 15th day of October, 1925, under the terms of which the Contractor has agreed to build a branch line of railroad for the Company extending from Oro Fino to Headquarters in the State of Idaho. The Contractor has said branch line partially completed but is now in default under said contract and is indebted to material and supply men and others for such large amounts that it is impossible for the Contractor to continue work under said contract, and the Company now has the right to cancel said contract but is willing to make the arrangement herein set forth to enable the Contractor to continue work under said contract.

In consideration of the premises the parties agree as follows:

The Company, acting through and by the Contractor, will pay Contractor's outstanding bills covering items of material and supplies (including camp supplies), which have gone into the work and shall reimburse itself to the extent of forty-nine thousand nine hundred forty-five dollars and twenty-five cents (\$49,945.25) from the retained percentages now held by the Company under said contract as security for complete performance of said contract, and shall have the right to reimburse itself for the balance of the amount so expended

by the Company in payment of Contractor's outstanding bills from future monthly estimates as they fall due. The balance of said estimate shall be paid [133] to and applied by the Contractor in payment of current bills as they fall due for labor, material and supplies (including camp supplies) going into the work.

The Company will conduct an audit of outstanding bills and of the Contractor's books, which books will be open to such audit at any and all times on request of the Company and the Company will place an auditor in the Oro Fino office of the Contractor for that purpose. All bills hereafter incurred and payments made in the prosecution of the contract will be audited by the Company, such audit to be made currently as bills are contracted and paid.

This agreement is supplemental to and amendatory of said agreement of October 15, 1925. As evidence of its consent to and concurrence in the arrangement herein set forth and its agreement that payments to the Contractor or for Contractor's account shall be handled as hereinabove provided, Old National Bank of Spokane, Washington, assignee of payments under said contract of October 15, 1925, by virtue of an assignment dated October 18, 1925, has caused this agreement to be signed on its behalf by its President duly thereunto authorized.

Nothing in this contract contained shall be construed to be an assumption by the Company of obligations of the Contractor now existing or hereafter incurred to subcontractors, material or supply men or anyone else in connection with said con-

tract of October 15, 1925, as hereby supplemented and amended, or as abrogating any right or rights of the Company under said contract.

If the Contractor at any time shall fail to perform any agreement herein contained the Company may cancel this contract [134] and said contract of October 15, 1925; in which event the Contractor shall have no claim for damages, or for compensation for work done or material furnished, or for any portion of the percentage retained on monthly estimates; and the Company shall have the right to take possession of and hold the work done and material furnished and to retain all moneys which may be then unpaid.

In witness whereof the parties hereto have caused this agreement to be executed by their duly authorized officers the day and year first above written.

NORTHERN PACIFIC RAILWAY COMPANY,

By (Sgd) H. E. STEVENS.

TWOHY BROTHERS COMPANY,

By (Sgd) JAMES TWOHY,
Secy.

OLD NATIONAL BANK OF SPOKANE,
WASHINGTON,

By (Sgd) W. D. VINCENT,
President.

(Sgd) THE OLD NATIONAL BANK AND
UNION TRUST CO.,

Successor.
W. D. VINCENT,
Pres.

[Endorsed]: Answer and Exhibits thereto Filed
March 30, 1929. G. H. Marsh, Clerk. [135]

And afterwards, to wit, on the 24th day of August, 1929, there was duly filed in said Court, a reply, in words and figures as follows, to wit: [138]

[Title of Court and Cause.]

REPLY.

Comes now plaintiff, and for reply to the further and separate answer herein and so-called cross complaint, and the affirmative allegations incorporated in said answer in conjunction with the denials, admits, denies and alleges as follows:

I.

Denies each and every allegation contained in Paragraph VI beginning on Page 2, Paragraph VII beginning on Page 3, Paragraph VIII beginning on Page 4, Paragraph IX beginning on Page 5, Paragraph XIII beginning on Page 6, Paragraph XIV beginning on Page 6, Paragraph XV on Page 7, Paragraph XVIII on Page 8, Paragraph XIX beginning on Page 8, Paragraph XX on Page 9, Paragraph XXI on Page 9, Paragraph XXIII beginning on Page 10, Paragraph XXV beginning on Page 11, Paragraph XXVI beginning on page 12, Paragraph XXVII beginning on Page 13, and Paragraph XXIX on Page 14 of said answer.

II

Admits all of the allegations of Paragraph I of said further and separate answer. [139]

III

Admits all of the allegations of Paragraph II.

IV

Replying to Paragraph III of said further and separate answer, plaintiff denies that said contract gave to defendant any of the rights therein alleged, and denies that said contract contained the provisions recited in said paragraph and refers the Court to the contract for the exact wording thereof.

V

Denies each and every allegation contained in Paragraph IV of said further and separate answer, except that plaintiff admits that the construction of said railroad contemplated and required adequate financing and effective organization on the part of plaintiff, and that it involved a large amount of excavation and extensive bridge work and other work ordinarily included in railroad construction in a mountainous region.

Plaintiff further alleges that it was adequately financed and had an effective organization to perform not only the work contemplated by the parties at the time the contract was made, but also the very greatly increased amount and changed character of work required of plaintiff by defendant as alleged in the complaint, but that defendant's engineers from the outset of the performance by plaintiff of the work under said contract consistently and persistently refused to allow plaintiff in the monthly estimates the full amount of work performed by the plaintiff at the time such estimates were made and intentionally and knowingly allowed plaintiff in

each monthly estimate quantities far below the true amount of work which had at said time been performed by plaintiff, and knowingly and intentionally refused to classify [140] materials excavated by plaintiff according to the nature of such materials, but instead placed the same in cheaper classifications than those to which plaintiff was entitled; that during the year 1926 plaintiff in its grading operations encountered approximately 200,000 cubic yards of a spongy, sticky conglomerate of boulders, clay and mica, which could only be handled at an expense greatly in excess of the cost of handling solid rock for which classification the highest price was named in said contract, the cost of handling said material being approximately \$1.38 per cubic yard; that neither plaintiff nor defendant knew at the time the contract was made that any such material would be encountered nor did they or any of them have any means of knowing or suspecting the same; that plaintiff demanded of defendant that said material be classified specially in accordance with the terms of Articles 58 and 59 of the grading specifications; that defendant conceded that such material should be classified specially but refused to fix the price therefor with due regard to the prices fixed for other classifications, but compelled plaintiff to accept as pay therefor \$1.20 per cubic yard. That thereafter much more of said material was excavated and payment for a part of said material was made at said price of \$1.20 per cubic yard, and that the alleged over pay-

ments on excavation referred to in said paragraph IV of the separate and further answer consisted of the payments made for said specially classified material at the rate of \$1.20 per cubic yard which was far below the actual cost to plaintiff of handling the same; that neither at the time said price was fixed or at any time up to the time the complaint was filed herein did defendant assert or pretend said price was too high or incorrect or a gratuity or advancement above the amount to which plaintiff was then entitled. [141]

Plaintiff further alleges that from time to time as contemplated by its contract with defendant it made claims for extra work and various items of work performed as to which it disagreed with the resident engineer as to which of the prices provided for in the contract applied. Said claims were denied by defendant's resident engineer and were thereupon submitted to the Chief Engineer of defendant. A part of said claims were from time to time allowed by the Chief Engineer of the defendant and the rest refused; that the alleged over payments which defendant claims to have made on the bridge work and on track and ballast work consist of some part of the claims asserted by plaintiff under the contract as the work was in progress and allowed by the Chief Engineer of the defendant; that without the bill of particulars demanded by plaintiff it is impossible for plaintiff to know and it does not know to what particular claims defendant refers; that at no time after the allowance of said

claims and up to and until after the filing of the complaint in this action has the defendant asserted or claimed that said payments were incorrect or should not have been made or were gratuities or advancements beyond the amounts at said time earned by plaintiff.

VI

Denies each and every allegation in Paragraph V of said further and separate answer, except it admits that on or about April 26, 1927 the so-called supplemental contract attached to the answer and marked Exhibit B was executed by the parties and alleges the fact to be that at said time defendant's engineer by said consistent and persistent short estimating of the amount of work performed each month by plaintiff and improper classifications was withholding from [142] payments to which plaintiff was entitled under the terms of the contract for work done more than \$200,000.00 over and beyond the 10% retained percentage provided for in the contract, thereby seriously hampering plaintiff financially and at the same time insisting upon great speed in the work; that plaintiff frequently protested to the resident engineer of the defendant against such short estimates and improper classifications without any result until finally in April, 1927 the inaccuracy and insufficiency of such estimates became so glaring and so burdensome that plaintiff demanded of the Chief Engineer of defendant that estimates reasonably approximating the amounts to

which plaintiff was then entitled be given forthwith to plaintiff on the penalty of abandoning the contract; that defendant's Chief Engineer refused to pass upon the justice of plaintiff's claims but insisted upon postponing the same until completion of all of the work which would have forced plaintiff to discontinue the work; that defendant's Chief Engineer thereupon asserted and pretended that plaintiff was in default, although he well knew that plaintiff was not in default, and offered to advance to plaintiff a part of the amount which plaintiff was then entitled under the contract if plaintiff would execute said instrument attached to the answer as Exhibit B, the so-called supplemental contract, and that plaintiff, in order to secure a part of the money to which under the contract it was then entitled and to be able to continue the work, and not otherwise, and with full knowledge on the part of defendant that plaintiff was not in default, was compelled to and did execute said Exhibit B.

VII.

Denies each and every allegation contained in Paragraphs VI and VII of said further and separate answer, except that [143] plaintiff admits that from time to time after April 26, 1927 defendant advanced to plaintiff various sums of money, but at no time were such advances equal to the amounts then earned by plaintiff, and at no times were said advances even equal to the amounts shown by defendant's short estimates and improper classifications to be due plaintiff.

IX.

Denies each and every allegation of Paragraph VIII of said further and separate answer, except that plaintiff admits that on or about July 16, 1927 defendant took possession of the first 29 miles of said railroad and excluded plaintiff therefrom and plaintiff alleges that such possession was taken forcibly by the defendant over the protest of the plaintiff and was so taken for the purpose of defrauding the plaintiff out of the revenue which plaintiff would have earned for hauling commercial freight which was at that time being shipped; that such possession was not taken by defendant in good faith but solely and only for the purpose of perpetrating said fraud on plaintiff.

X.

Denies each and every allegation of Paragraph IX of said further and separate answer, except that it admits that it objected to defendant's taking possession of said 29 miles of railroad.

XI.

Denies each and every allegation contained in Paragraph X, except that it admits that plaintiff demanded payment for hauling materials as stated in said paragraph.

XII.

Denies each and every allegation contained in Paragraph XI of said further and separate answer.

Further replying to the affirmative matter contained in the answer herein and as an affirmative reply thereto, and particularly Paragraphs VII, IX and X thereof, the plaintiff alleges as follows:

I.

That it has no knowledge or information of any such arbitration proceedings as those referred to therein having ever been held, and plaintiff has no knowledge or information of any of such alleged decisions having been made; that the defendant did not at any time during the progress of the work under said contract and has not since that time made any demand that the Chief Engineer arbitrate any of the matters or things referred to in Paragraphs VII, IX and X of said affirmative answer; that neither defendant nor said Chief Engineer ever gave any notice to plaintiff that any of said matters were being or were about to be arbitrated; that plaintiff was never invited or given any opportunity by defendant or said Chief Engineer to be heard at any arbitration hearing in reference to any of said matters, nor was plaintiff present or heard at any of said alleged arbitration proceedings; that if said Chief Engineer ever undertook to arbitrate said matters or any of them, or to make any of said decisions he is alleged in said answer to have made, said arbitrations were held without notice to plaintiff, without knowledge on the part of the plaintiff thereof, without any opportunity for plaintiff to be heard, and without any participation by plaintiff in any such arbitration proceedings, or any of them.

II.

Plaintiff further alleges that if said Chief Engineer did, without notice to plaintiff, attempt to arbitrate the matters referred to in Paragraphs VII, IX and X [145] of said affirmative answer, and did attempt to make any of the decisions he is alleged in said paragraphs to have made, that said Chief Engineer did not exercise his honest and independent judgment thereon but consulted with the President and attorneys of the defendant and the officers of the Union Pacific System and of Weyerhauser Timber Company, which companies are and were under contract with defendant by which they agreed to bear a part of the cost of said railroad and followed their directions and advice; that said Chief Engineer did not act impartially but was partial to defendant and acted at all times in defendant's interest.

III.

That the contract between plaintiff and defendant gave no right to defendant to take away from plaintiff any important part of the work and itself perform that part of the work; that any alleged decision of the Chief Engineer that such right was given to defendant by said contract, if ever made, was not the result of the honest and independent judgment of said Chief Engineer as to the meaning of said contract, but was made for the sole and fraudulent purpose of taking away from plaintiff a valuable part of its contract and to save expense to defendant and its partners in the construction of said railroad.

IV.

That the contract between plaintiff and defendant named plainly the prices to be paid plaintiff for hauling timbers, piles and metal fastenings; that any alleged decision of said Chief Engineer requiring plaintiff to accept lower prices for such hauling than those named in the contract, if ever made, was not the result of the honest and independent judgment of said Chief Engineer as to the meaning of said [146] contract, but was made for the sole and fraudulent purpose of depriving plaintiff of a part of the remuneration called for by said contract and to save expense to defendant and its said partners, and was made at the instance of defendant's other officers and at the instance of officers of said partners in said construction, and was made in bad faith and is grossly wrong and unjust.

Wherefore, having fully replied to the affirmative matter in said answer plaintiff demands judgment as prayed for in the complaint.

GARRECHT & TWOHY

WILSON, REILLY & ISAACS

Attorneys for Plaintiff

United States of America

District of Oregon

State of Oregon

County of Multnomah—ss.

John F. Reilly, being first duly sworn, deposes and says: that he has read the foregoing reply, knows the contents thereof, and that the same is true; that he makes this verification for the reason

that there are not now in the state of Oregon any officers or agents of Twohy Brothers Company authorized by law to make verifications in its behalf.

JOHN F. REILLY

Subscribed and sworn to before me this 24th day of August, 1929.

[Seal]

ROSE W. SHENKER

Notary Public for Oregon

My commission expires: Jan 8, 1932.

[Endorsed]: Filed August 24, 1929. [147]

And afterwards, to wit, on the 29th day of April, 1936, there was duly filed in said Court, a stipulation to try cause without the intervention of a jury, in words and figures as follows, to wit: [148]

[Title of Court and Cause.]

STIPULATION

It is stipulated between the plaintiff and defendant that the above entitled cause may be tried and determined by the court, without the intervention of a jury, the parties hereby agreeing to waive a jury.

Dated April 29, 1936.

DELANCEY C. SMITH

McCAMANT, THOMPSON & KING

Attorneys for Plaintiff.

L. B. daPONTE

CAREY, HART, SPENCER &

McCULLOCH,

Attorneys for Defendant.

[Endorsed]: Filed April 29, 1936. [149]

And afterwards, to wit, on the 25th day of February, 1937, there was duly filed in said Court, and entered of record therein, findings of fact and conclusions of law, in words and figures as follows:

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having heretofore been tried by the court without a jury and the court now being fully advised makes and adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

I.

Plaintiff is a corporation organized and existing under the laws of the State of Oregon and is a citizen and resident of the State of Oregon. Defendant is a corporation organized and existing under the laws of the State of Wisconsin and is a citizen and resident of the State of Wisconsin.

II.

This action is one of a civil nature between citizens of different station and the amount in controversy exceeds the sum of \$3000, exclusive of interest and costs.

II.

On or about October 15, 1925, plaintiff and defendant entered into a written contract for the construction by plaintiff for defendant of a line of railroad from Orofino, Idaho, following the course of Orofino Creek to a point named [151]

Headquarters, Idaho. The contract was in writing and there accompanied it complete specifications describing the manner in which the clearing, grubbing, grading, bridging, tracklaying, ballasting, and all other elements of the work were to be done, and prescribing unit prices for each type of work carried on.

IV.

Performance of the contract was sublet by the plaintiff to various subcontractors, and the plaintiff advanced the necessary funds to enable the subcontractors to perform the work. In accordance with the provisions of the contract, the subcontractors and the division of the work among them was approved by the defendant.

V.

The contract between plaintiff and defendant did not provide for the handling of any specific amount of yardage nor for the construction of any stated number of bridges, or tunnels, or changes in the channel of Orofino Creek, but for all of the work of every kind necessary in the construction and completion of a branch line of railroad from Orofino to Headquarters, plaintiff was to be paid for all the work done at the unit prices applicable to the particular type of work, as specified in the contract.

VI.

At the time plaintiff and others were invited to submit bids for the purpose of a proposed contract, defendant delivered to plaintiff and other

prospective bidders, maps, profiles, and other data showing the proposed route of the railroad to be built as theretofore located and surveyed, with the locating engineer's estimate of quantities of material [152] to be removed, and other information. Such preliminary data did not purport to fix definitely the location of the line to be built or the amount or extent of construction work to be done, but did indicate the route to be followed by the proposed railroad.

VII.

In the construction of the railroad there were two instances in which a change of line was directed by defendant. This resulted in leaving the route originally surveyed and constructing the line upon a different location. There were many other instances in which the line was not constructed exactly as indicated by the location survey, and the number of bridges built and the number of channel changes made differed from those indicated by the preliminary data supplied to bidders. But the work actually done by defendant was the work contracted for and was not a change of the line and grade of railroad contracted to be built, or of the work embraced in the contract.

VIII.

Plaintiff in the performance of the contract handled a much greater amount of yardage than that shown by the estimates made by the locating engineer and shown on the preliminary data supplied to plaintiff and other prospective bidders prior to

the making of the contract. But the yardage so handled by plaintiff was the work which it contracted to do at the unit prices applicable and was not additional work resulting from any change in the line or grade of railroad or the amount of work embraced in the contract. [153]

IX.

The contract between the parties contemplated and required the construction of bridges such as those actually built by plaintiff and its subcontractors in the performance of the work, both with respect to foundations and superstructure. No change was required by defendant in this class of work from what was contemplated when the contract was entered into.

X.

The additional yardage, the increased number of channel changes, the decreased number of bridges, whether changes from the work contracted for or merely changes from preliminary estimates made before the contract was entered into, did not make the unit prices of the contract inapplicable and did not affect such prices within the meaning of the provision of the contract authorizing changes in the work.

XI.

Plaintiff did not, during the progress of the work or at its conclusion or at any time, represent to the chief engineer of the defendant that changes had been made in the line or grade of railroad, or in the amount of work embraced in the contract, or that the cost of the work or unit prices stated

in the contract had been affected by any such changes, and plaintiff did not at any time invoke action of the chief engineer of defendant under the provision of the contract authorizing changes in the work. The "substantial justice" clause of the contract is applicable to the contract as a whole; no cost accounting sufficient for the application of this clause is before the Court. [154]

XII.

Defendant's chief engineer at no time made any determination that changes had been made by defendant in the line or grade of the railroad contracted to be built or in the work embraced in the contract, or that the cost of the work covered by the contract had been affected by reason of any asserted changes.

XIII.

Defendant's chief engineer, at the conclusion of the work, proposed to pay plaintiff the sum of \$80,000, less an offset of \$20,000 claimed to be due from plaintiff for car rental and demurrage. Said proposed payment was not an acknowledgment or recognition of any claim by plaintiff for an increase of prices or for additional compensation under the provision of the contract authorizing changes in the work, but was an offer of compromise in settlement of all claims of plaintiff, and was conditioned upon its acceptance by plaintiff as a full and complete settlement in satisfaction of all of its claims.

XIV.

The contract provisions with respect of special classification are

“Special Classification may be established at the option of the Chief Engineer and with the consent of the Contractor when material in substantial quantities is encountered of such character that it can not in his opinion be properly classified in any of the above defined classes.

“Unit prices, for such material to be fixed by the Chief Engineer with due regard to prices stipulated in the contract for materials covered by contract classification.”

In performing said contract a conglomerate material [155] was encountered in substantial quantities, much of it in the deep excavations for channel changes, and was given a special classification by the defendant's chief engineer, who allowed additional compensation for moving same. Said allowance is found to have been made in good faith and to be reasonable.

XV.

The contract gave plaintiff the right to conduct commercial hauling while the line was under construction and was breached by defendant in the following manner:

During the year 1926 defendant planned that the road would be ready to move logs during the summer of the year 1927 and the Clearwater Timber Company cut and banked logs along the rail-

road right of way to the extent of many million feet of timber. These logs were Idaho white pine, with a stumpage value of \$10 per thousand feet, and would be seriously damaged if not moved before the winter of 1927-1928.

In April, 1927, the defendant filed its log tariff with the Interstate Commerce Commission. Thereafter the plaintiff hauled some logs for the timber company under direction of the defendant's engineer. In June, 1927, the defendant asserted its intention to conduct the log haul. The plaintiff protested, and the defendant thereupon served upon the plaintiff a notice as follows:

"NORTHERN PACIFIC RAILWAY
COMPANY

Engineering Department

St. Paul, Minn. July 8, 1927.

Twohy Brothers Company,
General Contractors,
Orofino, Idaho.

Gentlemen:

You are hereby notified to stop work covered by your contract between Orofino and the [156] northerly end of Jaype Siding on July 16, 1927.

In accordance with my verbal understanding with Mr. James Twohy, you will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16th. The Railway Company will deliver to you at Jaype, without cost to your Company, rail and

other materials required for completion of your contract north of that point.

Yours truly,

H. E. STEVENS'

The plaintiff protested. The defendant did not in fact stop work, but itself took over and finished work on that portion of the road covered by said notice. The work required of the plaintiff under its contract on that portion of the road was not finished when the notice to stop work was served. On October 7, 1927, the defendant served on the plaintiff the following notice:

“NORTHERN PACIFIC RAILWAY
COMPANY

Orofino, Idaho
October 7, 1927

Twohy Bros. Co.,
Orofino, Idaho
Gentlemen:

I am authorized by the Chief Engineer to notify you to stop all work covered by your contract between the west switch of Jaype siding and the east switch of Summit siding on October 12th.

In accordance with my conversation with Mr. James Twohy and your Mr. Horan you will proceed with the completion of the contract work west of the east headlock of Summit siding, confining your operations to that portion of the line after October 12th. The Railway Company will deliver to you at Summit,

without cost to your company, rail and other material required for the completion of your contract.

Yours truly,

H. M. TREMAINE,

Assistant Engineer."

This was answered by Twohy Brothers as follows:

[157]

"Orofino, Idaho,

October 20th, 1927.

Mr. H. M. Tremaine, Asst. Engr.,

Northern Pacific Railway Co.,

Orofino, Idaho.

Dear Sir:

We have your letter of October 7th and in accordance with the peremptory order therein contained are stopping all work between the west switch of Jaype siding and the east switch of Summit siding.

However, we adhere to the position taken by us in a letter addressed to Mr. Stevens, the chief engineer, dated July 14th, 1927, and we do not admit the validity of your construction of our contract, but on the contrary think that our rights thereunder are being infringed.

Yours truly,

TWOHY BROTHERS COMPANY,

By

"

The defendant did take possession of that portion of the road mentioned in the defendant's said letter of October 7 on October 12 and exclude plaintiff therefrom. On October 25, 1927, the last

portion of the road under construction was taken by the defendant before completion but without serving upon the plaintiff any notice to stop work, and the plaintiff was excluded therefrom. At the time the defendant so took possession of each portion of the road in this finding mentioned, the work required of the plaintiff under its contract on such portion was not finished and the plaintiff was progressing satisfactorily with its contract and the defendant did not in good faith intend to stop work but did intend to continue the work itself and took possession of the road for the purpose of conducting the log haul and depriving the plaintiff thereof.

The log haul was commercial business. To do it [158] was required of the plaintiff under its contract, and the plaintiff was entitled to perform same. There was no change in plans or work when the portions of the road were so taken over by the defendant and work was not stopped. The road was turned over to the Operating Department on December 31, 1927.

XVI.

By permission of the defendant, the plaintiff continued the contract beyond the stipulated time and the defendant accepted the work, but the defendant did not permit the plaintiff to conduct any commercial hauling over the portions of the road taken over by the defendant.

XVII.

The right to the commercial haul was not submitted to the Chief Engineer for decision, was not a matter for submission under the contract, and taking the haul from the plaintiff was not pursuant to the arbitration clause of the contract, but constituted an arbitrary and coercive use of an assumed power. Before this position, the Chief Engineer obtained advice from the attorneys for the defendant. There is neither pleading nor proof of estoppel against or waiver by the plaintiff.

XVIII.

It was admitted at the trial that the total number of car miles of commercial freight at \$1.00 per car mile transported by defendant over the line under construction July 17, 1927, to October 25, 1927, amounted to \$304,301.08, and July 17, 1927, to December 31, 1927, amounted to \$443,184.70. The auditor found the fair cost of such transportation by plaintiff would have been \$72,209.95 for the [159] shorter period, and \$120,111.60 for the longer period. The Court approves these findings, but the Court finds that the plaintiff was entitled to conduct the commercial haul only until September 1, 1927, when the contract was to have been finished; that the plaintiff was prepared to conduct such haul, and was damaged in the sum of \$125,000 by being deprived thereof up to September 1, 1927; that the right to conduct said commercial haul terminated on that date. The Court further finds that plaintiff's pleadings do not present the

issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927.

XIX.

The contract fixed prices for hauling certain materials, as follows:

Hauling piles furnished by the company	
per lineal foot mile.....	\$.02
Hauling timber furnished by the com-	
pany per thousand feet b.m. mile.....	.85
Hauling metal fastenings per ton mile.....	.65

These stipulations of the contract were breached by the defendant, who paid for hauling said materials at the rate specified in the contract for commercial hauling and refused to pay at the rate specified in the contract for hauling said materials. This material haul is not commercial haul and was intended to be compensated at the specified prices for material haul. The plaintiff hauled timber furnished by the defendant for which the plaintiff should have been paid \$47,253.99. The defendant has paid but \$20,410.52 of this amount, leaving unpaid and due to plaintiff on this item \$26,843.47. The plaintiff hauled piling furnished by [160] the defendant for which the plaintiff should have been paid \$5353.78. The defendant has paid but \$660.49 of said amount, leaving unpaid and due to the plaintiff on this item \$4693.29. The plaintiff hauled metal fastenings (bridge iron and galvanized iron) furnished by the defendant for which plaintiff should have been paid \$2563.31. The defendant has

paid but \$1313.62 of this amount, leaving unpaid and due the plaintiff on this item \$1249.69.

XX.

The price to be paid to the plaintiff for hauling the materials mentioned in finding XIX was not submitted to the chief engineer for decision, was not a matter for submission under the contract, and refusing to pay the contract price was not pursuant to the arbitration clause of the contract, but constituted an arbitrary and coercive use of an assumed power. There is neither pleading nor proof of estoppel against or waiver by the plaintiff.

XXI.

At the hearing before the auditor on February 13, 1930, it was stipulated that upon the final estimate, exclusive of the facts hereinabove found, there was due on the so-called "book-accounting" to the plaintiff from the defendant, the sum of \$8865.75. The said stipulation of the amount due constituted an account stated, and therefore interest should be allowed from the date thereof. On February 3, 1932, the defendant filed in this court and cause an offer of judgment in the following terms, omitting title:

"Now comes defendant, Northern Pacific Railway Company, and offers to allow judgment to be given against it and in favor of plaintiff herein for the sum of \$9365.75, with interest thereon at [161] the rate of 6% per annum from February 1, 1928, in which sum

defendant acknowledges itself to be indebted to plaintiff, and for the further sum of \$500.00 together with costs accrued to this date and such other costs as may be incurred in entering the judgment.

Dated December 29, 1931.”

The item of \$8865.75 is allowed, with interest at the rate of six per cent per annum from February 13, 1930.

XXII.

The contract provides that when in the opinion of the chief engineer the contract shall have been performed, he shall give a final estimate and statement of the balance unpaid, and the company within thirty days thereafter shall pay the balance due. The road was completed and turned over to the operating department of defendant December 31, 1927. Thereafter the defendant breached its contract by failing to make the final estimate required.

Based upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

I.

That the plaintiff is not entitled to any recovery on its so-called construction claim.

II.

Defendant breached its contract by taking over an uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct

the hauling of commercial freight over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company [162] and to be used in the construction of said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book accounting, the sum of.....\$8,865.75
with interest thereon at six per cent
per annum from February 13, 1930

On the commercial haul, the sum of.....125,000.00
with^{out} interest prior to judgment

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers.....\$26,843.47
For hauling piling..... 4,693.29
For hauling bridge metals..... 1,249.69
without interest prior to judgment

III.

For all of said recoveries, the plaintiff is entitled to have judgment against the defendant, as also for its costs and disbursements herein incurred.

Dated: February 25th, 1937.

JAMES ALGER FEE

Judge

[Endorsed]: Filed February 25, 1937. [163]

And afterwards, to wit, on Thursday, the 25th day of February, 1937, the same being the 91st judicial day of the regular November, 1936, term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[164]

[Title of Court and Cause.]

JUDGMENT

The above entitled cause having been tried to the court without a jury, a jury having been waived in writing, and the court having made and filed its findings of fact and conclusions of law, now on motion of plaintiff it is

Ordered and adjudged that plaintiff have and recover of and from defendant the sum of \$170,-390.58, and its costs and disbursements herein taxed at \$1632.61, and that execution may issue therefor.

Dated February 25, 1937.

JAMES ALGER FEE

Judge

[Endorsed]: Filed February 25, 1937. [165]

And afterwards, to wit, on the 19th day of May, 1937, there was duly filed in said Court, defendant's bill of exceptions, in words and figures as follows, to wit: [166]

[Title of Court and Cause.]

DEFENDANT'S BILL OF EXCEPTIONS
INTRODUCTORY STATEMENT

Be it remembered that this action came on for trial before the Honorable James Alger Fee, District Judge sitting without a jury, on the 21st day of May, 1936. The trial was concluded and the case submitted for decision on the 25th day of May, 1936. A written stipulation waiving a jury had theretofore and on the 29th day of April, 1936, been duly filed. DeLancey C. Smith, Esq., and Messrs. McCamant, Thompson & King (the latter having theretofore been substituted for Messrs. Wilson & Reilly) appeared on behalf of plaintiff and Charles A. Hart, Esq., and Messrs. Carey, Hart, Spencer and McCulloch appeared on behalf of defendant.

Thereafter and on the 4th day of January, 1937, the Court announced in an oral opinion a decision of the questions of law and fact involved in the action; and thereafter and on the 25th day of February, 1937, findings of fact and conclusions of law were duly made, adopted and filed, and thereupon and on said 25th day of February, 1937, judgment was duly entered and adopted herein.

[167]

Thereafter and on the 27th day of February, 1937, and during the same term of court in which the judgment was entered and docketed, the following order was made extending the time for presenting and settling bills of exceptions herein and extending for the purpose of such presentation and settlement the term in which the judgment was entered:

(Title)

“Upon application of defendant,

It is Ordered that the time within which either party hereto may submit a bill of exceptions for allowance, certification and filing is hereby extended to June 1, 1937.

It is Further Ordered that the present term of court be and is hereby extended to June 1, 1937, for the purpose of submission, allowance, certification and filing of bill of exceptions in this action, and for the purpose of granting any further extension of time which the Court may order.

Dated February 27, 1937.

JAMES ALGER FEE,

District Judge”

Prior to the trial of this cause and on the 17th day of September, 1929, an order was made by the Honorable Robert S. Bean, then District Judge, referring the cause to an Auditor and Special Master for a preliminary hearing upon the questions of

fact involved. Such a hearing was had and thereafter and on April 23, 1931, the Auditor and Special Master filed his report, and subsequently and on December 5, 1931, filed a supplemental or summarized report. With the first report there was filed a complete transcript of the evidence received and all of the proceedings had at the hearing before the Auditor and Special Master. Between the filing of the first report and the filing of the supplemental report, the Honorable Robert S. Bean died and the case was transferred [168] to the Honorable John H. McNary, then District Judge. After the filing of the supplemental report, the case was transferred to the Honorable James Alger Fee, District Judge.

Objections to the reports of the Auditor and Special Master were thereafter filed by plaintiff and defendant thereafter filed a motion to modify and correct said reports, said objections and motion being submitted to the Court on March 8, 1932. Thereafter the Court announced its readiness to dispose of said objections and motion in order to make the reports of the Auditor and Special Master available for use at the trial of the cause, but no action was taken thereon or to bring said case for trial until substituted counsel for plaintiff, on November 4, 1935, filed a motion for leave to serve and file an amended complaint in the action. Said motion was thereafter granted, subject to conditions imposed, which conditions were not accepted by plaintiff, and the case was thereafter set for trial upon the original pleadings, subject to certain amendments

made by interlineation upon stipulation of counsel at the time of trial.

Before the trial and on April 29, 1936, a stipulation was entered into between the parties and duly filed, providing for the admission at the trial of the testimony offered by the respective parties at the hearing before the Auditor and Special Master. Said stipulation, omitting title and signatures, is as follows:

“It is stipulated that at the trial of the above cause the testimony of any witness given before the auditor may be read by either party from the transcript thereof, whether or not said witness is personally present in court, and whether or not such witness testifies in person at the trial. When so read such testimony shall be considered as testimony offered at the trial by the party [169] who called such witness to testify before the auditor. If any part of the testimony of any witness given before the auditor is offered at the trial, all of the testimony given by such witness before the auditor shall be considered as included in the offer. All objections to testimony made during the hearing before the auditor shall be considered and ruled upon by the court, and exceptions to the court’s ruling will be considered as having been taken. No other objections to testimony shall be offered.

Dated April 29, 1936.”

Thereafter and at the trial of the cause before the Honorable James Alger Fee, District Judge,

plaintiff offered in evidence the testimony given by each witness for plaintiff, and all of the exhibits offered therewith, at the hearing before the Auditor and Special Master, and defendant offered in evidence the testimony given by each witness for defendant, and all of the exhibits offered therewith, at said hearing before the Auditor, all as shown by the transcript of testimony and exhibits filed with the Auditor's report; said evidence and exhibits were thereupon received in evidence by the Court, subject to objections made thereto during the hearing before the Auditor. No additional testimony was offered by either party and the cause was finally submitted to the Court on May 25, 1936.

STATEMENT OF DEFENDANT'S EXCEPTIONS.

I.

During the progress of the trial and before the final submission thereof, defendant submitted to the Court a motion to make and adopt the following, among other, Findings of Fact and Conclusions of Law

Requested Findings of Fact

"XV.

Under the terms of the construction contract, [170] plaintiff was required to complete ballasting and surfacing work upon the railroad track until a smooth and even surface acceptable to defendant was secured. Defendant did not require plaintiff to do all of this work with

respect to the first twenty-nine miles of railroad, between Orofino and Jaype, but without reducing plaintiff's compensation for tracklaying, ballasting, and surfacing in any way, defendant accepted this portion of the railroad without full performance by plaintiff. This action was taken by defendant on July 8, 1927, and plaintiff was notified to stop all work upon this part of the railroad. Defendant thereafter engaged in common carrier log transportation upon the part of railroad thus accepted and taken over from plaintiff."

The Court refused to make the foregoing special Finding of Fact, and to such refusal defendant duly reserved an exception which was allowed by the Court in the following words and figures:

"To the decision and order of the Court refusing to make and enter Finding of Fact No. XV in the form duly requested by defendant prior to the time of final submission of this cause to the Court."

"XVI.

Defendant made no commitment of any kind to anyone with respect to the log traffic to be handled over that part of its railroad so taken over on July 8, 1927, and was not obligated at that time to engage in log transportation prior to the final completion of its railroad."

The Court refused to make the foregoing special Finding of Fact, and to such refusal defendant duly reserved an exception which was allowed by the Court in the following words and figures:

“To the decision and order of the Court refusing to make and enter Finding of Fact No. XVI in the form duly requested by defendant prior to the time of final submission of this cause to the Court.”

“XVII

Plaintiff, during the negotiations leading up [171] to the execution of the supplemental contract of April 26, 1927 (under which defendant thereafter financed plaintiff's operations), or thereafter or at any time until June 17, 1927, made no claim of any right to retain possession of defendant's railroad, or any part thereof, beyond the time when defendant was willing to accept and take over such railroad, or any part thereof, for the purpose of conducting log transportation thereon. But at all times prior to June 17, 1927, plaintiff acquiesced in construing its contract with the defendant as one for the construction of defendant's railroad, without any right to conduct log transportation upon the newly laid track other than to haul in its work trains any cars of commercial freight which defendant might desire to have hauled at the stated compensation of \$1.00 per car mile therefor.”

The Court refused to make the foregoing special Finding of Fact, and to such refusal defendant duly reserved an exception which was allowed by the Court in the following words and figures:

“To the decision and order of the Court refusing to make and enter Finding of Fact No. XVII in the form duly requested by defendant prior to the time of final submission of this cause to the Court.”

Requested Conclusions of Law.

“II.

Plaintiff was not entitled, under its contract with defendant, to retain possession of any part of defendant's branch line railroad, after track-laying and before final completion, for the purpose of conducting transportation operations thereon; defendant had the right to accept said railroad, or any part thereof, without demanding complete ballasting and surfacing thereof.”

The Court refused to adopt the foregoing Conclusion of Law, and to such refusal defendant duly reserved an exception, which was allowed by the Court in the following words and figures:

“To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. II in the form duly requested by defendant prior to the time of final submission of this cause to the Court.” [172]

“III

Defendant, in taking over from plaintiff the first twenty-nine miles of its railroad after tracklaying and before final completion of ballasting and surfacing, was within its legal rights under the provision of the contract allowing defendant to stop any part of the work contracted for at any time.”

The Court refused to adopt the foregoing Conclusion of Law, and to such refusal defendant duly reserved an exception, which was allowed by the Court in the following words and figures:

“To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. III in the form duly requested by defendant prior to the time of final submission of this cause to the Court.”

“IV

Defendant was under no legal obligation to engage in common carrier transportation when it took over the first twenty-nine miles of its line from plaintiff, and was not obligated to accept log traffic to be handled thereon. The amount of log traffic accepted and transported by defendant after so taking over this portion of its railroad cannot be taken as the measure of what log traffic would have been accepted and transported if said portion of the line had remained in the control of plaintiff as contractor.”

The Court refused to adopt the foregoing Conclusion of Law, and to such refusal defendant reserved an exception, which was allowed by the Court in the following words and figures:

“To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. IV in the form duly requested by defendant prior to the time of final submission of this cause to the Court.”

“V

“Defendant, in taking over said portion of its railroad and in conducting log transportation thereon, did not breach its contract with plaintiff, and plaintiff is not entitled to recover [173] upon its claim for damages for alleged breach of contract in this particular.”

The Court refused to adopt the foregoing Conclusion of Law and to such refusal defendant reserved an exception, which was allowed by the Court in the following words and figures:

“To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. V in the form duly requested by defendant prior to the time of final submission of this cause to the Court.”

The Court, after submission of the cause and after consideration thereof, and after announcement of a decision thereon, made and entered the following Findings of Fact and Conclusions of Law:

Finding of Fact

“XV

The contract gave plaintiff the right to conduct commercial hauling while the line was under construction and was breached by defendant in the following manner:

During the year 1926 defendant planned that the road would be ready to move logs during the summer of the year 1927 and the Clearwater Timber Company cut and banked logs along the railroad right of way to the extent of many million feet of timber. These logs were Idaho white pine, with a stumpage value of \$10 per thousand feet, and would be seriously damaged if not moved before the winter of 1927-1928.

In April, 1927, the defendant filed its log tariff with the Interstate Commerce Commission. Thereafter the plaintiff hauled some logs for the timber company under direction of the defendant's engineer. In June, 1927, the defendant asserted its intention to conduct the log haul. The plaintiff protested, and the defendant thereupon served upon the plaintiff a notice as follows:

‘NORTHERN PACIFIC RAILWAY
COMPANY

Engineering Department
St. Paul, Minn. July 8, 1927.

Twohy Brothers Company,
General Contractors,
Orofino, Idaho.

[174]

Gentlemen:

You are hereby notified to stop work covered by your contract between Orofino and the northerly end of Jaype Siding on July 16, 1927.

In accordance with my verbal understanding with Mr. James Twohy, you will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16th. The Railway Company will deliver to you at Jaype, without cost to your Company, rail and other materials required for completion of your contract north of that point.

Yours truly,

H. E. STEVENS'

The plaintiff protested. The defendant did not in fact stop work, but itself took over and finished work on that portion of the road covered by said notice. The work required of the plaintiff under its contract on that portion of the road was not finished when the notice to stop

work was served. On October 7, 1927, the defendant served on the plaintiff the following notice:

NORTHERN PACIFIC RAILWAY
COMPANY

Orofino, Idaho,
October 7, 1927

Twohy Bros. Co.,
Orofino, Idaho.

Gentlemen:

I am authorized by the Chief Engineer to notify you to stop all work covered by your contract between the west switch of Jaype Siding and the east switch of Summit Siding on October 12th.

In accordance with my conversation with Mr. James Twohy and your Mr. Horan you will proceed with the completion of the contract work west of the east headblock of Summit siding, confining your operations to that portion of the line after October 12th. The Railway Company will deliver to you at Summit, without cost to your company, rail and other material required for the completion of your contract.

Yours truly,
H. M. TREMAINE,
Assistant Engineer.' [175½]

This was answered by Twohy Brothers as follows :

‘Orofino, Idaho,
October 20th, 1927.

Mr. H. M. Tremaine, Asst. Engr.,
Northern Pacific Railway Co.,
Orofino, Idaho.

Dear Sir :

We have your letter of October 7th and in accordance with the peremptory order therein contained are stopping all work between the west switch of Jaype siding and the east switch of Summit siding.

However, we adhere to the position taken by us in a letter addressed to Mr. Stevens, the chief engineer, dated July 14th, 1927, and we do not admit the validity of your construction of our contract, but on the contrary think that our rights thereunder are being infringed.

Yours truly,

TWOHY BROTHERS COMPANY,
By ,

The defendant did take possession of that portion of the road mentioned in the defendant's said letter of October 7 on October 12 and exclude plaintiff therefrom. On October 25, 1927, the last portion of the road under construction was taken by the defendant before completion but without serving upon the plain-

tiff any notice to stop work, and the plaintiff was excluded therefrom. At the time the defendant so took possession of each portion of the road in this finding mentioned, the work required of the plaintiff under its contract on such portion was not finished and the plaintiff was progressing satisfactorily with its contract and the defendant did not in good faith intend to stop work but did intend to continue the work itself and took possession of the road for the purpose of conducting the log haul and depriving the plaintiff thereof.

The log haul was commercial business. To do it was required of the plaintiff under its contract, and the plaintiff was entitled to perform same. There was no change in plans or work when the portions of the road were so taken over by the defendant and work was not stopped. The road was turned over to the Operating Department on December 31, 1927." [175]

The defendant thereupon reserved an exception to said Finding of Fact No. XV of the Court, which was duly allowed by the Court, said exception being in words and figures as follows:

"To the conclusion and decision of the Court stated in Finding of Fact No. XV to the effect that the contract between the parties gave plaintiff the right to conduct commercial haul while the line was under construction, and was breached by defendant in the manner stated in said finding of fact; and to the conclusion

stated in said finding of fact that plaintiff was entitled to conduct log transportation for Clearwater Timber Company as commercial business.”

Conclusions of Law

“II

Defendant breached its contract by taking over as uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct the hauling of commercial freight over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book

accounting, the sum of	\$ 8,865.75
with interest thereon at six per cent	
per annum from February 13, 1930	

On the commercial haul, the sum of	125,000.00
without interest prior to judgment.	

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers	\$ 26,843.47
For hauling piling	4,693.29
For hauling bridge metals	1,249.69
without interest prior to judgment.”	[176]

The defendant thereupon reserved an exception to said Conclusion and decision of the Court, which exception was duly allowed by the Court, said exception being in words and figures as follows:

“To Conclusion of Law No. II that defendant breached its contract in the respects therein stated and that plaintiff is entitled to recover the amounts specified in said Conclusion of Law No. II.”

“III.

For all of said recoveries, the plaintiff is entitled to have judgment against the defendant, as also for its costs and disbursements herein incurred.”

The defendant thereupon reserved an exception to said Conclusion of Law, which exception was duly allowed by the Court, and which exception was in words and figures as follows:

“To Conclusion of Law No. III that plaintiff is entitled to have judgment against defendant for the amounts specified in Conclusion of Law No. II.”

The following is the evidence necessary for a consideration of the questions of law involved in the rulings to which the foregoing exceptions were reserved:

STATEMENT OF EVIDENCE—I.

Testimony of

HUGH M. TREMAINE,

a witness called on behalf of plaintiff.

Witness is a civil engineer in the employ of Northern Pacific Railway Company, with eighteen years of service with that Company, including operations both before and after Federal control of railroads. He was the engineer in charge [177] of the construction of the Orofino Branch. Said construction work was covered by documents identified as plaintiff's Exhibit 19, being contract between Northern Pacific Railway Company and Twohy Brothers Company, dated October 15, 1925, and supplemental contract between the same parties, dated April 26, 1927, with transmittal letters from the chief engineer of the Railway Company. Plaintiff's Exhibit 19 is identical with Exhibits A and B of defendant's answer herein, and alleged in said answer to have been executed by the parties, which said allegation is admitted by plaintiff's reply. For this reason Exhibit 19 is not reproduced here.

The said contract between the parties to this litigation was prepared and written by Mr. H. E. Stevens, chief engineer of the defendant company.

Exhibit 20 is a letter written by the witness to Twohy Brothers Company on April 3, 1928, with statement of cars of commercial business handled by the Railway Company between July 17, 1927, and January 1, 1928. The cars shown on the statement include all commercial business handled on the new line taken over, both log traffic and other

(Testimony of Hugh M. Tremaine.)

business from which revenue was received. Thirty cars of rails sold to Clearwater Timber Company and transported to point of delivery are not included.

PLAINTIFF'S EXHIBIT 20

is as follows:

“Twohy Bros. Company,
Orofino, Idaho.

Gentlemen:

In accordance with the request of Mr. Horan of April 2nd, attached please find a statement showing cars of logs hauled off the Orofino Branch by the Northern Pacific Railway Company in the period July 17, 1927, to January 1, 1928.

Yours truly,
H. M. TREMAINE,

District Engineer. [178]

STATEMENT OF CARS AND MILEAGE TWO WAYS FROM OROFINO TO JAYPE AND INTERMEDIATE SPURS— JULY 17, 1927 TO JANUARY 1, 1928.

Whiskey Spur	Fohl Spur	Olson Spur #1	Olson Spur #2	Haley Spur	Placer Spur	Jaype	Cars	Miles	Car Miles
47								6.99	328.53
	72							12.08	869.76
		37						24.13	892.81
			42					25.30	1,062.60
				2				38.57	77.14
					11			43.71	480.81
						7663		57.35	439,473.05
47	72	37	42	2	11	7663	7874		443,184.70”

Testimony of

JAMES F. TWOHY,

a witness called on behalf of plaintiff.

The officers of Twohy Brothers Company are witness' brother John D. Twohy, president, Philip Twohy, vice president, the witness, James F. Twohy, secretary, and a Mr. Wiley, treasurer.

The bid submitted by Twohy Brothers was prepared by Mr. M. S. Boss, superintendent of Twohy Brothers Company, and was submitted by said Mr. Boss and said James F. Twohy, and was the bid upon which the contract of October 15, 1925, with defendant, was made.

Witness was living in Portland, Oregon, during the construction period and was in and out of the location of the work from time to time. Mr. Boss, the superintendent, was in charge all the time. In August, 1926, witness went to St. Paul for the purpose of requesting an advance of \$50,000 on retained percentage for work theretofore done on the contract. The witness saw Mr. Stevens in his office, obtained the allowance of retained percentage which he was after, and then when he was about to leave the Stevens office, [179] the latter asked witness what he wanted to do about the log haul. Witness asked what Mr. Stevens meant. Whereupon the latter stated that he had written a letter to Twohy Brothers with respect of the log haul in the following year, and had received a communication from the construction engineer, Mr. Tremaine, regarding the payment for hauling bridge timbers, and wanted to know what the contractor wanted to

(Testimony of James F. Twohy.)

do about that and what the contractor's attitude was on that subject. Witness told him he had not seen the letter and had not participated in any discussion out West but that his idea was that the contract would govern and whatever the contract said would probably be a satisfactory guide for the contractor.

Witness at that time had not participated actively in the work, the work being actually and directly in charge of Mr. Boss. He was superintendent in charge of the work and had a participation in the profits. He was very competent. Witness kept track of the job naturally with anxiety and interest but had not consulted the contract nor looked at it from the time he had signed it.

Mr. Stevens regarded the answer of witness as somewhat challenging and apparently thought witness should not take such a position. In answer to a query as to what Mr. Stevens then said, the witness stated:

“Well, he said that if I elected or thought it proper to stand literally on our contract he would advise me to read it again, because it certainly provided him with much more advantage in any literal interpretation of the contract than it did us.”

This statement was made aggressively, hotly. Witness answered Mr. Stevens that he did not mean to be challenging him, that he was not familiar with the thing in its particulars, but that his idea as a contractor was that the Chief [180] Engineer was

(Testimony of James F. Twohy.)

the authority on a job, and that witness was not beginning a job with many difficulties by challenging his authority.

At that time serious difficulties were developing on the job. It was expanding rapidly in size and the volume of material was already mounting way beyond what either side had expected,—“what we expected anyway.” The contractor was in trouble over bridge matters and the job in general was taking on the look of a tough and difficult job.

Witness arrived in St. Paul in the morning and left the same evening. On the way west on the train he wrote a longhand personal letter to the chief engineer, which is dated August 17, 1926, and is in evidence as Exhibit 32. Said letter reads as follows:

PLAINTIFF'S EXHIBIT 32

“I have been somewhat troubled about our brief and rather hurried discussion in your office on Friday, on the subject of a hauling price on bridge material, and also on the subject of operating the line between June 1st, and Sept. 1st, hence this personal word to make my position quite clear.

I have not seen any correspondence on the subject referred to, nor looked at our contract since I signed it, but my attitude is simply that you are to write the ticket and we to follow it. We are to build this line to your full satisfaction, and in all the activities and operations involved in that program we wish to comport our-

(Testimony of James F. Twohy.)

selves and expect to be treated as a Department of the Northern Pacific under your direction, serving and advancing in every way we can the best interest of the company. I do not mean to imply, of course, that our contract does not substantially define and specify our duties, nor that we would ever seek to foist on you any of our proper responsibilities under it. I only want you to know that I regard our contract not as a strait jacket preventing any free modifications for the benefit of the work, and certainly not as a kind of legal fish-pond to hook advantage out of, but simply as a mutual written understanding, as exact and detailed and specific as it can possibly be made in advance, which sets out the method and time and price governing a complicated job we agree to do for you. [181]

Under its letter, and even more in this sincere spirit of its terms, you are the umpire in all the interpretative complications that naturally arise, and that of course is quite understood and agreeable to us. We will do the work as well and faithfully as we know how, and we cheerfully leave all questions of interpretation, including these two above mentioned, to your judgment, to the end that the N. P. may get the best possible job for its money, without any undue hardship on us, which after all is the

(Testimony of James F. Twohy.)

general principle governing all of us and underlying the whole contract.

You may feel this note unnecessary, in your 'down-Maine' way, and perhaps it is, but I write it because I know how often misunderstanding can color even a sound and cordial relationship for lack of free and frank expression.

Let me thank you again for the prompt and courteous release of the \$50,000.00 which was much appreciated and will help us materially on the job."

The subject of commercial haul came up next at a meeting in Mr. Stevens' office in St. Paul in November, 1926. By this time the job had gone from bad to worse and the contractor had very serious difficulties on it, financial and physical, and was struggling with the weather, and some of the subcontractors were at a cracking point, and on many points the contractor felt it had matters for the chief engineer to pass on and claims it wished to submit to him. The following testimony was then given by the witness (Tr. pp. 184-185):

"A. By November of 1926 the job had gone from bad to worse and we had very serious difficulties on it, financial and physical, and we were struggling with the weather, and some of our subcontractors were at a cracking point, and on many points we felt we had matters for

(Testimony of James F. Twohy.)

the chief engineer to pass on and claims we wished to submit to him and discussions we wanted to have with him, with a view to getting the situation somewhat improved.

Q. Now without detailing the merits of those claims, and confining yourself as far as possible to the consideration of one question at a time—we just took up this commercial freight and we might as well go on with it—what in that con- [182] versation was there relating to the hauling of the commercial freight?

A. Well, I was in his office with Mr. Boss the day after Thanksgiving for the purpose of submitting a number of claims to him, among others a claim for change in bridge plans and the difficulties our bridge sub-contractors were having as a result of it, and the discussion was brief because of another matter and only lasted an hour or so and we didn't go into these particulars and were not able to as to the whole nature of our claim but Mr. Stevens asked me what the difficulties were in general, and I said, 'Well, among other things our bridge men are having a terrible time out there and are about ready to crack. They are heavily in debt and in the hole, and their morale is broken and their spirit is shaken and they need some assistance. They need some treatment of these claims without too much delay.' And he said, 'Well, they are probably hollering too soon.'

(Testimony of James F. Twohy.)

Those fellows may make a whole lot of money.' And I said, 'Why, you are probably referring to the log haul next summer, but they can't live that long; they will sink before then.'

Q. What did he say to that?

A. I don't remember what he said. He shrugged his shoulders, or the subject passed off. There was nothing further said. That conference was broken up by the fact that he was leaving that night and we didn't have much time."

There was no further discussion of the subject of commercial haul until in the summer of 1927. At this time the log haul was about ready to come up, would be due within a few weeks, and the line was about ready to move logs, and there had been discussion among the contractors and subcontractors of rumors that the Northern Pacific proposed to take the log haul away from the contractor. In June, 1927, Mr. Stevens visited the work in Idaho, went over the line, and the witness rode to Portland with him on the train. At that time Mr. Stevens stated to witness "that he was going to take that log haul over for themselves, the Northern Pacific proposed to take it over, and I told him that we proposed to ob- [183] ject."

With respect of the understanding mentioned in Exhibit 36 hereinafter quoted, the witness stated that the understanding had in Mr. Stevens' car

(Testimony of James F. Twohy.)

when he said he was going to take the logs away from the contractor was that the contractor was going to protest in accordance with law and legal advice, but not with guns or rocks or anything of that kind, and if Mr. Stevens would tell the witness what his plan was the contractor would undertake physically not to blast the plan.

Prior to this time the Twohy Company, through its subcontractor Pacific Utilities Company, had made preparations for the hauling of logs. This subcontractor had notified the Twohy Company at the end of May that they were prepared to haul logs and would object to having the log haul taken away from them. Witness told the subcontractor that the Twohy Company expected the subcontractor to haul the logs and Mr. Boss also told them to make the necessary preparations. The subcontractor, Pacific Utilities Company, had handled all commercial business, including the hauling of logs, up to this time.

Exhibit 33 is a letter dated May 29, 1927, from Pacific Utilities Company (subcontractor) to Twohy Brothers Company, reading as follows:

PLAINTIFF'S EXHIBIT 33.

"Twohy Bros. Co.,
Orofino, Idaho.

Gentlemen:

During the past sixty days we have frequently heard that it is the intention of The North-

(Testimony of James F. Twohy.)

ern Pacific Railway Co. to take the log haul away from us, when the track reaches Jaype. This would constitute a strict violation of our contract, which we hereby protest against most emphatically. [184]

Since June 1926 we have worked day and night building bridges and laying track whenever the grade was ready. We have erected bridges between unfinished cuts; laid track on almost impossible mud cuts and fills, at a great loss of money, but with the fixed purpose of laying track to Jaype by June 1st, 1927. We have suffered delays running into months, causing us to do the major part of our work under the most adverse conditions; Storms, snow, rain and mud. All of the bridge work in particular has been pushed in the extreme. We have used almost superhuman effort to erect bridges to permit tracklaying, then followed up with the permanent decking and other back work.

All bridge back work was done at an increased cost, while on track work, absolutely all of it was extra cost for the track organization was prepared, by the very nature of it, to complete such work as the laying progressed. The tracklaying was completely organized and disbanded many times, to say nothing of the other tie ups when not necessary to disband. This loss runs into thousands of dollars.

(Testimony of James F. Twohy.)

We suffered the hardships of strenuous efforts, and loss of money for none of these operations were economical, all being sacrificed in the interest of speed, and since it is anticipated that there is a chance to make a dollar from the log haul, we should not be deprived of that opportunity.

We are prepared to begin hauling logs as soon as the track is laid to Jaype and the surfacing done.

We await your assurance that the log haul will not be erased from our contract.

Yours truly,

Pacific Utilities Co."

Exhibit 34 is a letter dated June 17, 1927, from Twohy Brothers Company to Pacific Utilities Company, with carbon copy to Mr. H. M. Tremaine, reading as follows:

PLAINTIFF'S EXHIBIT 34.

"Pacific Utilities Company,
Postoffice Box 876,
Orofino, Idaho.

Gentlemen:

Replying to your letter of May 29th, we hope to adjust the matter of log-haul with Mr. Stevens on his forthcoming visit to this job. We expect you to haul the logs at the prices named and in accordance with your contract

(Testimony of James F. Twohy.)

with us. Of course, [185] your contract with us is entirely contingent upon our contract with the Railroad Company, and we disclaim any responsibility to you for any curtailment or changes which the Northern Pacific may enforce. We feel, however, that even should the Railway Company take over this haul for any reason, it would only be done for the good of the work and with due regard to the rights of yourselves and all concerned.

Yours truly,

TWOHY BROTHERS COMPANY.”

PLAINTIFF’S EXHIBIT 35

is a letter dated June 19, 1927, from H. M. Tremaine to Twohy Brothers Company, reading as follows:

“Twohy Bros. Company,
Orofino, Idaho.

Gentlemen:

Beg to acknowledge receipt of your letter of June 17th enclosing copy of letter received from the Pacific Utilities Company together with copy of your reply.

Yours very truly,

H. M. TREMAINE,

Assistant Engineer”

(Testimony of James F. Twohy.)

PLAINTIFF'S EXHIBIT 36

is a letter dated July 8, 1927, from H. E. Stevens to Twohy Brothers Company, reading as follows:

“Twohy Brothers Company,

General Contractors,

Orofino, Idaho.

Gentlemen

You are hereby notified to stop all work covered by your contract between Orofino and the northerly end of Jaype Siding on July 16, 1927.

In accordance with my verbal understanding with Mr. James Twohy, you will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16th. The Railway Company will deliver to you at Jaype, without cost to your Company, rail and other materials required for completion of your contract north of that point.

Yours truly,

H. E. STEVENS” [186]

(Testimony of James F. Twohy.)

PLAINTIFF'S EXHIBIT 37

is a letter dated July 14, 1927, from Twohy Brothers Company to H. E. Stevens, reading as follows:

“Mr. H. E. Stevens, Chief Engineer,
Northern Pacific Railway Company,
St. Paul, Minnesota.

Dear Sir

We acknowledge your letter of July eighth in which you notify us to stop work covered by our contract between Orofino and Jaype.

As explained we wish to offer no physical obstruction to the completion of this work, but on the contrary are anxious to conform in every way possible to your plans. However, the taking over of this section of the line, in accordance with your notice, in effect deprives us of the profits which should rightfully accrue to us under Item 72 of the prices for the work. Inasmuch as this deprivation is a violation of the letter and spirit of our contract, entailing serious loss to us, we feel obliged to protest against this action. To carry out the apparent terms of our contract, we have made all necessary preparations for hauling the logs which have been commonly understood would be offered by the Weyerhaeuser interests. Your anticipatory breach of our rights in this matter renders any further action futile, and we accord-

(Testimony of James F. Twohy.)

ingly yield to your express notice and desire, but without prejudice to any rights we may have under the contract, which said rights we now expressly assert on behalf of ourselves and our subcontractee, the Pacific Utilities Company.

Yours truly,
TWOHY BROTHERS COMPANY
By JAMES TWOHY"

PLAINTIFF'S EXHIBIT 38

is a letter dated October 7, 1927, from H. M. Tremaine to Twohy Brothers Company, reading as follows:

"Twohy Bros. Co.,
Orofino, Idaho.

Gentlemen:

I am authorized by the Chief Engineer to notify you to stop all work covered by your contract between the west switch of Jaype siding and the east switch of Summit siding on October 12th. [187]

In accordance with my conversations with Mr. James Twohy and your Mr. Horan you will proceed with the completion of the contract work west of the east headblock of Summit siding, confining your operations to that portion of the line after October 12th. The Railway Company will deliver to you at Summit, without

(Testimony of James F. Twohy.)

cost to your company, rail and other material required for the completion of your contract.

Yours truly,

H. M. TREMAINE

Assistant Engineer"

PLAINTIFF'S EXHIBIT 39

is a letter dated October 20, 1927, from Twohy Brothers Company to H. M. Tremaine, reading as follows:

"Mr. H. M. Tremaine, Asst. Engr.,
Northern Pacific Railway Co.,
Orofino, Idaho.

Dear Sir:

We have your letter of October 7th and in accordance with the preemptory order therein contained are stopping all work between the west switch of Jaype siding and the east switch of Summit siding.

However, we adhere to the position taken by us in a letter addressed to Mr. Stevens, the chief engineer, dated July 14th, 1927, and we do not admit the validity of your construction of our contract, but on the contrary think that our rights thereunder are being infringed.

Yours truly,

TWOHY BROTHERS COMPANY,
By JAMES F. HORAN."

Twohy Testimony (continued)

In July, 1927, there were twenty-five or thirty million feet of logs piled up along the line, prin-

(Testimony of James F. Twohy.)

cipally at Jaype. The contractor hauled one train load of logs and was paid for it under Item 72.

In preparation for handling commercial business, Mr. Horan (superintendent of Twohy Brothers Company) was in- [188] structed to ascertain where locomotives could be rented, and witness consulted with a machinery dealer in Portland and got an option on two locomotives. No additional equipment other than what the contractor already had was necessary. The Twohy Company had a couple of standard gauge locomotives on the job at the time.

Witness' next discussion with Mr. Stevens on the subject of commercial haul was in March, 1928, the line having been turned over to the Operating Department on January 1, 1928.

This conversation was in Mr. Stevens' office at St. Paul, witness having gone there to see him about the log haul and timber haul and any other adjustments necessary before the completion of the final estimate.

Witness told Mr. Stevens at this time that the estimate, so far as Mr. Tremaine's work went, so far as all of his engineering treatment was concerned, was satisfactory to the contractor and was fair and all right, but that Mr. Stevens ought to direct that there should be added to the estimate the amount due for the log haul and timber haul.

At this time witness was presenting only a claim on the log haul and timber haul, stating, however, that the bridge men had had substantial difficulties and were \$150,000 in the hole and should be recom-

(Testimony of James F. Twohy.)

pensed under the contract. But witness told Mr. Stevens that if there was paid what was due on the log haul and the timber haul, this would be accepted in settlement of everything since the bridge men were the ones most involved, and in the greatest difficulties, and would participate in that. [189]

JAMES F. TWOHY,

Cross Examination

Witness' trip to St. Paul, in August, 1926, was to secure \$50,000 out of the retained percentage. Mr. Stevens arranged for this payment. The letter of August 17, 1926, to Mr. Stevens was written on the train on the way back from St. Paul. Mr. Stevens' letter to the Twohy Company which Mr. Stevens referred to in the conversation in St. Paul, was not seen by the witness until his return to Orofino. The Stevens letter is Exhibit A-2.

DEFENDANT'S EXHIBIT A-2

is a letter from H. E. Stevens to Twohy Brothers Company, dated August 3, 1926, received August 5, 1926, and reading as follows:

"Twohy Brothers Co.,	TWOHY BROS. CO.
General Contractors,	AUG 5 1926
Orofino, Idaho	RECEIVED
Gentlemen:	

I discussed with Messrs. Weyerhaeuser and Billings today, matter of handling logs from Jaype siding to Orofino prior to completion of

(Testimony of James F. Twohy.)

the construction, and they advise me they plan to cut about 35,000,000 ft. provided they have definite assurance from us that we will be in position to handle the logs to their Lewiston Mill beginning on June 1, 1927.

I advised them that barring some major contingency which could not be anticipated, we expected to have the line in shape to handle logs in quantities on that date.

If their plans develop as anticipated, it will mean the handling of about 60 cars per day in each direction, or at least two trains with heavy power.

I think it would be advisable for the Railway Company to take over the operation and maintenance of the line to Jaype on the date these log movements start even though this section may not be entirely completed. Will you, therefore, please advise if such an arrangement will be satisfactory to your Company.

Yours truly,

H. E. STEVENS" [190]

Witness does not know whether he went to Orofino just before going to St. Paul (in August, 1926), but believes that he never saw Mr. Stevens' letter until his return from St. Paul. His first intimation that the log haul was in issue came from Mr. Stevens at St. Paul. No one told him of the receipt of Mr. Stevens' letter on August 5 prior to leaving for St. Paul, but Mr. Stevens, at the St. Paul meeting, explained that he had raised the question of the log

(Testimony of James F. Twohy.)

haul. The matter of the log haul was in the minds of the members of the contracting firm.

The conversation in St. Paul was brief, dealing first with the advance of \$50,000. Mr. Stevens raised the question of log haul and the price for hauling bridge materials and asked the witness what he wanted to do. As stated by the witness, "I told Mr. Stevens—when he asked me what we were going to do about it, I said I assumed that the contract would govern on those matters, and that riled him up and he got sharp and hot on the subject, and he practically told me that if I was standing on a literal interpretation of the contract, that he would advise me to read it again because it gave him much more power than perhaps I realized." The statement in witness' letter of August 17, 1926, that the contractor was willing to leave all questions of interpretation to the judgment of the Chief Engineer related to the log haul question and the timber haul question, under the arbitration clause of the contract.

After the correspondence with the Pacific Utilities Company in the early summer of 1927 about the log haul, Mr. Horan (superintendent) made investigations and gave witness assurances that engines could be secured, the railroad [191] company would furnish the cars. No other preparations were necessary as the job was simply to take the empty cars at Orofino and haul them up for loading and then bring them back. The Pacific Utilities Company had already handled such commercial business as had been offered.

(Testimony of James F. Twohy.)

Mr. Horan was on a trip over the line when the decision was reached to transfer the line to the Operating Department of the Railway Company.

Prior to March, 1928, witness had been furnished with a tentative final estimate which had not yet been given to the Chief Engineer for approval. Witness' trip to St. Paul in March, 1928, was for the purpose of discussing settlement of the job, and witness discussed with Mr. Stevens the job in many of its features and phases, and the difficulties that had been encountered, but stated that he had no criticism of Mr. Tremaine's estimates, that he had fairly estimated the quantities and classification, and that his subordinates had been eminently fair in those particulars. At this meeting witness asserted the right of the contractor to have conducted the log haul, and to the compensation claimed for hauling bridge materials. At a subsequent discussion in June, 1928, Mr. Stevens discarded the log haul and timber haul discussion,—put it out of the discussion. The witness further testified as to this as follows:

“We had a little exchange, as I testified yesterday, on the subject. We stood by our position that he had no right to take it away from us, and he stood on his that he had, and being of no advantage to carry that on further, we moved away from it.” [192]

Testimony of

M. S. BOSS,

a witness called on behalf of plaintiff

Witness is a contractor by occupation and had been superintendent of Twohy Brothers Company for over twenty years and had superintended railroad construction on numerous railroads in the United States and Canada covering much difficult work. Witness had prepared the original figures for the bid of plaintiff for the Orofino Branch construction and was in charge of the job as superintendent until succeeded by James F. Horan in 1927.

Witness first learned, through a letter from Mr. H. E. Stevens dated August 3, 1926 (Defendant's Exhibit A-2), of the possibility of the Railway Company wanting to take any part of the railroad away from the contractor. Prior to August 3, 1926, there had been extensive logging done. In July, 1926, Mr. Stevens had been over the new line; at this time logs were being brought down and piled by the right of way, and spur tracks were being built into the woods in several places.

The letter from Mr. Stevens (Defendant's Exhibit A-2) apparently was mailed at Spokane and was received in due course about August 5. Mr. Twohy was in Orofino between the time of receipt of this letter and the time of his going to St. Paul. Witness drove to Kendrick on the night of the 8th and brought him across country in his car, a trip of about 50 or 60 miles. They arrived at Orofino at eleven thirty or twelve o'clock at night and Mr. Twohy left on the stage the next day at two o'clock

(Testimony of M. S. Boss.)

for Lewiston. The discussion while Mr. Twohy was in Orofino on this trip was about obtaining money from the percentage hold-back of the railroad [193] company, and there was no discussion of the log haul. Witness thinks the letter (Exhibit A-2) was then in possession of Mr. Lykken, the office man of Twohy Brothers. Witness did not communicate the contents of this letter to Mr. Twohy nor did he show him the letter. It was not until Mr. Twohy's return from St. Paul, a week or ten days later, that he was advised of the receipt of the letter. In the meantime while Mr. Twohy was in St. Paul the witness made an estimate of the probable cost of operating trains for handling commercial business and the probable revenue to be derived therefrom. Twohy Brothers never answered Mr. Stevens' letter of August 3, 1926 (defendant's Exhibit A-2), because the log haul was away off in the distance, months ahead, and the contractor had many other troubles.

Witness was in St. Paul in November, 1926, with Mr. James Twohy and there interviewed Mr. Stevens. The troubles of the bridge contractors were presented briefly, but there was only a hurried discussion because Mr. Stevens had to leave St. Paul immediately, and after a statement that these contractors were about ready to blow up and leave the work, Mr. Stevens said:

“Well, I think they are hollering too soon, yelling too quick. They will probably make a lot of money on that log haul.”

(Testimony of M. S. Boss.)

About the middle of December, 1926, Mr. Stevens came out to Orofino to discuss the matters which had been mentioned at the prior meeting in December which had not been concluded because Mr. Stevens had to leave. Witness stated that bridge timbers placed under water should be paid for at a special price. Mr. Stevens laughed at this and said it was out of the question and then said: [194]

“I suppose that is like the log haul, you are hollering about that before you are hurt. In the final estimate when the work is completed all of these things can be adjusted.”

At neither this nor any other meeting did the witness ever hear it asserted that any question touching the log haul had been submitted to arbitration and determined by the chief engineer, and the witness was never notified of any proposal to arbitrate any such question and never took part in any such arbitration and was never notified of any award or decision.

A question at this point was propounded to the witness as to when he had first heard it said or claimed that the matter had been arbitrated, and counsel for the railroad company, Mr. Hart, interposed this objection and made this statement:

“I object to that question. There is not any claim of arbitration that I know of anywhere.”

Witness is experienced in operating locomotives and trains in construction work and his estimate of

(Testimony of M. S. Boss.)

the cost of handling logs on the Orofino job by the contractor is based upon two trains of thirty cars each per day and on a ninety-day operation. Witness believes his estimate of all items entering into the cost is adequate.

Prior to the time witness left the work and before July 17, 1927, the contractors handled as commercial haul everything moved over the newly laid track except the Northern Pacific ditcher train and its log train, which was picking up logs cut off the right of way. The railroad thus picked up a few cars but the contractor hauled all others. The logs so picked up were scattered logs cut from the right of way [195] which the railroad was attempting to salvage. The Northern Pacific train engaged in picking up right of way logs also picked up some cars but the contractors objected and engineer Tremaine stopped this immediately. The logs picked up on the right of way had been lying on the ground since 1925 or early 1926 and there was very little salvage in them. The contractors handled all the commercial business they could get and in July 1927, were prepared to handle the log traffic. Witness offered to furnish a ditcher and train to operate same but Mr. Tremaine decided that the Railway Company would operate the ditcher. The commercial business handled by the contractor included cars of rail and material for Weyerhausers and some loggers and also some cars of perishable freight.

(Testimony of M. S. Boss.)

The final revised figures of the witness for the estimated cost of handling commercial haul are \$595.90 per day. While \$20,000 was added for contingencies in the actual operation, there were only some cars off the track on the first trip. Arrangements had been made for an adequate supply of water.

M. S. Boss,
Cross-Examination

The commercial hauling was sublet by Twohy Brothers to Pacific Utilities Company at sixty cents a car mile, which would leave a profit of forty cents a car mile for plaintiff. In the invitation to bid the chief engineer told the contractor to prepare to haul logs between June and September, and the witness had knowledge about the proposed logging of the Clearwater Timber Company and the amount of logs that would probably be hauled. Upon this knowledge witness reduced Twohy Brothers' bid for hard rock from \$1.70 per cubic yard to 99 [196] cents per cubic yard at which price they did not expect to make much money on this item. The profile submitted with the invitation indicated the probable amount of solid rock work of which the witness in making his bid counted on about seven hundred odd thousand cubic yards. Reducing this bid price to 99 cents meant a difference of about \$60,000 to the contractor which he hoped to make up on the commercial haul.

Mr. Stevens' letter of August 3, 1926, was the first intimation witness had that the Railway Company proposed to take over the first 29 miles of the road

(Testimony of M. S. Boss.)

as soon as track was laid. The witness thereupon testified in response to cross-examination as follows:

“Q. And you had that letter there in your office for three days before you saw Mr. Twohy; that is correct, is it?

A. I might not have been in the office when that letter was received.

Q. But I assume it wasn't very long before you did see it?

A. Not very long.

Q. After its arrival?

A. No. It would be brought to my attention.

Q. What did you say?

A. It would be brought to my attention pretty promptly.

Q. It was a matter of very, very great importance I judge, in view of the fact you say you had bid expecting to make a large gain out of this commercial haul?

A. At that time we didn't treat it very seriously.

Q. Oh. Why not?

A. Because we expected to haul the logs.

Q. Oh, well, Mr. Stevens statement that you were not going to be permitted to haul them was not treated seriously by you? Is that what you mean?

[197]

Mr. Reilly: Objected to, because there is no such statement in the letter.

Q. (By Mr. Hart) Well, what do you mean by saying that you did not treat it very seriously?

(Testimony of M. S. Boss.)

A. He merely requested us to give up that part of it and we never entertained anything—any idea of ever giving it up.

Q. He requested you to express yourselves as to whether or not that program would be satisfactory to you, did he not? That is, for the railway company—I am now reading from the letter—‘for the Railway Company to take over the operation and maintenance of the line to Jaype on the date these log movements start even though this section may not be entirely completed.’ That was what was put up to you by that letter?

A. Yes, sir.

Q. Now you say you didn’t take that inquiry very seriously?

A. Not very seriously at that time. You know, we didn’t figure it would ever be done.

Q. And you never answered that letter, as I understand?

A. No.

Q. You knew at the time, I suppose, what it would mean to you in dollars and cents if that plan was carried out?

A. Yes. I made computations on it soon after.

Q. Within a day or two?

A. Oh, in a few days; I would not say the exact days.

Q. And according to your computations, as you have already testified to them, you figured then it

(Testimony of M. S. Boss.)

would take away perhaps three hundred thousand dollars from you?

A. Yes, sir.

Q. That is right, is it?

A. Yes, sir.

Q. And then on the night of the 8th you met Mr. Twohy at Kendrick and drove him from Kendrick to Orofino; that is right, is it? [198]

A. Yes, sir.

Q. How long a drive is that?

A. It is about an hour and a half drive, I would say.

Q. And I assume you talked over the work generally?

A. We talked over principally the financial problem part of it, money.

Q. But this letter of Mr. Stevens' was not brought up at all?

A. I don't ever remember mentioning it.

Q. Well, that is not quite the statement you made on direct examination. Now you say you don't remember mentioning it. It was a matter of sufficient importance, so, I assume, you surely would have remembered mentioning it if it had been mentioned?

A. It wasn't the main importance at that time. We were not worrying about that then. We had lots of other troubles.

Q. The loss of three hundred thousand dollars was of minor consequence to you at that time, was it?

(Testimony of M. S. Boss.)

A. We never figured in the money at that time, three hundred thousand dollars.

Q. Well, between the third, or, rather, between the fifth and the eighth of August, when you say Mr. Twohy, you had made the figures so that you knew what it would mean to you, hadn't you?

A. I don't think that I had made those figures at that time.

Q. Well, let's come back for a minute again to the question of whether or not you talked to him on that automobile trip. The subject matter of that letter was of sufficient importance so that you believe now you would remember it if you had talked with him?

A. I think so, yes.

Q. And you feel sure that you did not talk with him?

A. I am pretty certain I didn't talk to him on it.

Q. Then he spent from about midnight of the 8th until two o'clock in the afternoon of the 9th at Orofino, did he? [199]

A. Yes.

Q. What was he doing there?

A. The most of that time he was with Mr. Tremaine, I think. He had us make, myself and Mr. Lykken make up some statements of accounts payable, and going back to see Mr. Stevens for money advance on our retained percentage, and he wanted supporting figures for that.

Q. And during all of that time up to the time of his departure at two o'clock on the 9th, are you just

(Testimony of M. S. Boss.)

as sure that you didn't mention the subject matter of this letter to him?

A. I don't think that I even knew that he had left at two o'clock. I don't think I was there. I went up the line a ways, or around, and he was gone when I came back, I know.

Q. All right. I will limit the question to the times when you did see him up to the time of his departure on the 9th. You are sure you did not bring the subject matter of this letter to his attention, are you?

A. Yes, sir.

Q. At this time it is not a question of remembering; you are sure?

A. As near as I can remember, I never brought that to his attention."

Witness' attention was called to the testimony of Mr. Twohy that Mr. Stevens stated the bridge men were hollering too soon, they might make a lot of money, and that Mr. Twohy said that he probably referred to the log haul, and the witness answered that it was his recollection that Mr. Stevens said they would make a lot of money or might make a lot of money out of the log haul.

In making estimates of the cost of handling the log traffic nothing was allowed for ditcher operation because this was force account work paid for by the Railway Company. [200]

The contractor had work trains and equipment adequate to complete the line beyond the 29 miles

(Testimony of M. S. Boss.)

taken over. If the Railway Company had not taken over the first 29 miles the contractor would have been required to haul all of the material required for the upper part of the work. The contractor had adequate work train equipment to do all such hauling. The log trains would have moved the bridge materials. It would have been work trains hauling logs and materials. Witness contemplated the use of 70-ton locomotives handling 30 cars, although helper engine service might have been required to haul 30 empties up the hill.

As the amount of commercial business developed, the log haul would have aggregated approximately four hundred odd thousand dollars, less \$100,000 expense, or a \$300,000 profit, but when submitting the bid for Twohy Brothers the witness figured on only enough log haul to offset the reduction in price for moving hard rock. They never figured the amount in dollars and cents, but estimated that the amount of commercial haul would justify the reduction in price for moving solid rock.

The contractor was not soliciting commercial business from the public but was prepared to haul any cars placed on the track at the direction of Mr. Tremaine or his subordinates. The contractor would be required to do clearing or ditcher work before the track was laid, but witness believes that after track was laid, such work was paid for as extra work. When the grade was finished in different locations, the engineer would pass upon the work and accept the grade. As fast as the grading work was

(Testimony of M. S. Boss.)

finished to sub-grade in each location, the engineer would pass upon the work and decide upon the acceptance of the grade.

Cars of logs on that line averaged about 7000 or 8000 feet. The average logs were small. [201]

The invitation to bidders was a letter written by the chief engineer, dated September 18, 1925, addressed to Twohy Brothers. This was introduced in evidence as

PLAINTIFF'S EXHIBIT 21.

It contains, among other statements, the following:

“You will note we have specified that work be commenced immediately on award of contract, and that bridging, grading and track laying be completed on or before June 1, 1927. Balance of work to be completed on or before September 1, 1927. This line is to be constructed for the purpose of handling logs and forest products from the Clearwater timber belt to the large mills to be constructed at Lewiston, in connection with the power development work now under way at that point.

The Clearwater Timber Company expect to have their new mill at Lewiston ready for operation in the early part of 1927, and as this will represent a very large investment it is important that the railway be in position to deliver logs to the mill on its completion. We have

(Testimony of James F. Horan.)

therefore specified that the track laying shall be completed not later than June 1. This will put us in position to start delivery of logs and a little additional time can be allowed for the finishing, ballasting and completion of the railway."

Testimony of

JAMES F. HORAN,

a witness called on behalf of plaintiff.

Witness is superintendent of Twohy Brothers Company and was in charge of the Orofino work beginning in the month of June, 1927. Twohy Brothers Company finished the actual construction of the line on October 25, 1927. All forces were laid off then and the outfit cars were moved from Headquarters to Orofino. No work was done thereafter except some extra work on force account. Witness remained at Orofino until March, 1928, repairing and reconditioning equipment, etc. The Camas Prairie Railroad, a subsidiary of Northern Pacific and Oregon-Washington Companies, took over the operation of the new line on January 1, 1928. From July [202] 15, 1927, on, the contractor had adequate water facilities for train operations. Trains of the contractor were operating over the first 29 miles of said road prior to July 17, 1927. After the Northern Pacific took charge of the first 29 miles, log trains

(Testimony of James F. Horan.)

were handled every day, the logs being delivered to the Clearwater Company at Lewiston.

Prior to July 17, 1927, Twohy Brothers Company had a crew of men lining track, ballasting, etc., on that part of the line between Orofino and Jaype. This crew did some track lining and similar work on this part of the line after July 17, 1927, for which the contractor was paid as force account. Prior to July 17, 1927, payment had been made under the contract. The Camas Prairie Railroad, a subsidiary of the Northern Pacific and Oregon-Washington companies, began operating the line on January 1, 1928. Witness does not know of any written notice given by the Railway Company that it would take over the line from Summit to Headquarters, although such notice was requested if the road was to be taken.

Prior to July 17, 1927, the subcontractor, Pacific Utilities Company, handled some commercial business on the line below Jaype. Some commercial business was hauled by the Northern Pacific locomotive and witness protested to Mr. Tremaine against this, and the railroad engineer furnished a statement of the business handled by the railroad company. Prior to the taking over of part of the line on July 17, 1927, the Northern Pacific moved commercial cars on the line a total of 564.36 car miles. On March 3, 1928, engineer Tremaine checked a statement prepared on behalf of Twohy Brothers Company, showing commercial cars handled

(Testimony of James F. Horan.)

by the Railway Company, and ascertained to what extent an accounting for them had been omitted in the estimate theretofore given the contractor. [203]

The Railway Company had locomotives on the line prior to July 17, 1927, to haul ballast, operate a ditcher, etc., and to pick up stray right of way logs; this was referred to as a "cherry picker."

Witness discussed with Mr. Tremaine the order signed by Mr. Stevens directing the taking over of the line from Orofino to Jaype. Mr. Tremaine had the notice in his possession for some time before serving it, Mr. Tremaine stated that the dates were left blank in the notice when it came from St. Paul and Mr. Tremaine was to fill in the dates.

James F. Horan,

Cross Examination.

Some of the Twohy equipment was used in December, 1927, the Railway Company paying a rental charge which included the wages of the operator. These items were included in estimates later rendered, classified as force account. The work in which this equipment was used continued until about the middle of January, 1928, and it was in charge of the Railway Company. Witness was at Orofino until March, 1928, arranging for storage of equipment which could not be moved out until spring.

Testimony of

H. L. LYKKEN,

a witness called on behalf of plaintiff.

Witness is an accountant and was employed by Twohy Brothers Company on the Orofino work.

According to information supplied by H. M. Tremaine, Northern Pacific engineer, there were 7530 cars of logs and 344 cars of other commodities handled between Orofino and Jaype by the Railway Company between July 17, 1927, and December 31, 1927. These cars were moved a total of 443,184.70 [204] car miles, which, at \$1 per car mile, amounts to \$443,184.70.

For the period between July 17, 1927, and October 25, 1927, there were handled by the Railway Company between the same points 5250 cars of logs and 62 cars of other commodities. These cars were moved a total of 304,301.08 car miles, which at \$1 per car mile, amounts to \$304,301.08.

Rumsey & Jordan, a subcontractor under plaintiff, finished their work on the first residency in August, 1926. The total allowance in estimates at the time of finishing this residency was \$248,040.31. When the final estimate came in on this residency the total allowance was \$324,661.81, showing a hold-back of \$76,623.50. The work on this residency was finished prior to August 31, 1926. Work on the second residency by Rumsey & Jordan was finished on or before December 31, 1926. The aggregate of the monthly estimates allowed on this work to its com-

(Testimony of H. L. Lykken.)

pletion, including the December estimate, was \$264,895.04. The final estimate on this residency showed that the proper allowance was \$310,104.96, or a hold-back of over \$45,000.

Parker & Knowles, a subcontractor on residency No. 4, had its work practically completed January 31, 1927. The total contract on this residency was \$228,413.55. The hold-back between the monthly estimates and the final estimate was over \$45,000.

In each of the computations referred to above the witness took the monthly estimates, aggregated them, and compared the aggregate with the amount paid on the final estimate. The ten per cent retention by the Railway Company would be included in the difference. All payments were made to Twohy Brothers who in turn dealt with the subcontractors.

[205]

Testimony of

H. E. STEVENS,

a witness called on behalf of defendant.

Witness is vice president of Northern Pacific Railway Company in charge of operation and maintenance, having held that position since August 10, 1928. His service with the Company began in 1904 as assistant engineer. In 1916 witness became chief engineer and held that position until he became vice president in August, 1928. During these periods witness had charge of a volume of construction work involving an estimated one hundred million dollars.

(Testimony of H. E. Stevens.)

At the time of the execution of the contract with Twohy Brothers Company on October 15, 1925, witness discussed the Twohy bid with Mr. Twohy and Mr. Boss, having before him a work sheet containing an analysis of all the bids as applied to estimated quantities, but this work sheet was not shown to Mr. Twohy or Mr. Boss. It disclosed to Mr. Stevens that the low bidders were Twohy Brothers and Stewart & Welch, but the former bid 99 cents for solid rock removal and the latter bid \$1.08 for the same work. This involved upwards of 700,000 cubic yards, was an item in which an overrun was expected, and made the Twohy Brothers bid more attractive. Upon this work sheet, no quantities at all were set up for commercial haul, covered by price item 72. There were eleven bidders and the prices specified by the bidders for commercial haul ranged from 50 cents a car mile to \$5 a car mile.

No commitment was ever given to the Clearwater Timber Company as to the time when logs would be accepted for transportation on the new line. The Timber Company frequently asked that a date be fixed but witness always took the position that the railroad would be ready to haul logs [206] by the time the Timber Company had its log pond ready to receive them.

When log hauling started, the Timber Company had less than half a head of water in its log pond. The pond was composed of a dam with a dike from the dam to the river bank, with the Northern Pacific

(Testimony of H. E. Stevens.)

tracks laid across the property. Additional trackage was constructed under a contract with the Inland Power & Light Company. Logs were dumped off a trestle at the easterly end of the pond. Later it was necessary to dump the logs on dry land. This continued until the logs piled up as high as the top of the trestle, and then logs were dumped off yard tracks at locations where they could later be rolled to the area which would be covered with water. The head of water was gotten up some time late in the fall, and then it froze up, freezing in those logs that had been dumped on dry land in front of the log pond, with the result that they did not get their works cleared away and in shape to operate until the ice broke up in January of that year, 1928.

The letter of August 3, 1926 (Defendant's Exhibit A-2), to Mr. Twohy was written under the following circumstances: Witness had made a trip over the line and had been down to Lewiston and gone over the work down there with officers of the Clearwater Timber Company who were urging him to fix a date when logs would be moved. Witness then wrote the letter to Mr. Twohy in order to develop what his attitude would be.

The Railway Company had contracted with Clearwater Timber Company to haul logs from any point on the line between Orofino and Headquarters to Lewiston at a rate of \$2.95 per thousand feet, log scale. In the contract between Northern [207] Pacific Railway Company, Oregon-Washington Rail-

(Testimony of H. E. Stevens.)

road & Navigation Company, and Clearwater Timber Company, dated December 3, 1925 (Plaintiff's Exhibit 143), referring to the railroad to be constructed from Orofino into the timber, the following recital appears on page 6:

“As the operation of said proposed railroad will necessarily be begun before the actual completion thereof in its permanent form, it is understood and agreed . . .”

The distance between Orofino and Lewiston is 43 miles. This rate of \$2.95 is made up of two items—\$1.65 for the transportation on the existing railroad (between Lewiston and Orofino) and \$1.30 for the transportation on the new line. At this rate, payment for hauling a car of logs from any point on the new line to Orofino would be \$9.75. At the rate of \$1.00 per car mile claimed by the contractor, the payment to the contractor for the same transportation service would be \$56.40. This is based upon payment of \$1.00 per car mile in both directions on an average mileage of 56.4 car miles.

Mr. James F. Twohy called at witness' office in St. Paul about August 15, 1926. Witness first asked Mr. Twohy if he had seen witness' letter to Twohy Brothers Company of August 3, 1926 (Defendant's Exhibit A-2), about log transportation and Mr. Twohy answered that he had not. Witness then either showed him the letter or told him about it and explained his position. Mr. Twohy answered

(Testimony of H. E. Stevens.)

that he had not examined the contract and had not given the matter any consideration, but he thought the contract provisions would probably govern. The witness then recited said conversation as follows:

“And, as he has recited, why, I became rather emphatic, that I didn’t consider the log haul a [208] part of the construction contract, not so intended—left absolutely no doubt in his mind as to where I would stand on the log haul question from then on. And I also broached this letter that I had just received from Mr. Tremaine about the claim for team haul and told him with equal emphasis that I didn’t propose to pay team haul prices for material that was hauled by train; that we could consider those two questions settled.”

The conversation then turned to the subject of prices for team haul and to Mr. Twohy’s request for an advance of \$50,000.

Witness had no further discussion with Mr. Twohy upon this question until the following summer. Witness received no other reply to his letter of August 3, 1926 (Defendant’s Exhibit A-2), than Mr. Twohy’s letter of August 17, 1926 (Plaintiff’s Exhibit 32).

Beginning in the fall of 1926, requests for additional compensation were made by the Twohy Company upon representations that the work was proving very expensive and the contractors were be-

(Testimony of H. E. Stevens.)

coming involved. In August an advance of \$50,000 was made from the retained percentage and again in September another \$50,000 was advanced.

Early in December, 1926, another advance of \$30,000 was requested but not granted because the November estimate amounting to \$121,000 was about to be sent on. The retained percentage was then about \$57,000.

This retained percentage is not due until the contract is completed, and it gradually accumulates during the course of the contract, and this advance that witness spoke of was simply advance money before it was due and charging it off against the retained percentage to relieve the financial stringency. Along the latter part of November Mr. Twohy and Mr. Boss called on the witness in St. Paul and discussed a few general propositions without going into any detail in [209] particular, although the witness at that time asked them to state their business, if they had any, but as the witness was called East the next night, they decided that they would not open the subject and departed.

Referring to the testimony of witnesses Twohy and Boss about this meeting, witness testified as follows:

“I have no doubt I probably said they were hollering before they were hurt, but no mention was made of log haul. The log haul wasn’t in sight.

(Testimony of H. E. Stevens.)

As I have just stated, I probably said they were hollering before they were hurt. I made no statement about the log haul, because the question of log haul was very much taboo from the August meeting. But that conversation, to go on with that, was to the effect that I didn't care to consider making adjustments of a contract in the course of its procedure; that no one knew how a contract would show up in the final results; and I repeatedly made that statement in the subsequent conferences, that all these things should wait until we found out what the total result of the contract as a whole would be."

With reference to the claim of short-estimating, the witness testified as follows:

"Q. Was anything said at this time about the kind of estimates they were getting, whether they were liberal or otherwise?

A. I never had a kick on so-called short estimating, if that is what you have in mind.

Q. Well, what did you say to them about what you thought was the situation?

A. Well, as a matter of fact when this work did begin to show that it might result in a deficit to the contractor I had instructed Mr. Tremaine—— [210]

Mr. Reilly: We object to any private conversation between the witness and Mr. Tremaine, at which none of the 'Twohys' representatives were present.

(Testimony of H. E. Stevens.)

Mr. Hart: Yes. Instead of giving any instructions to Mr. Tremaine, you might tell what, if anything, was done, to your knowledge, by Mr. Tremaine, pursuant to those instructions.

A. He increased the estimates in every way we could. To put it flatly, we gave them everything in sight."

Witness went over the line on December 18, 1926, and had a conference with Mr. James F. Twohy and Mr. D. W. Twohy. Mr. James F. Twohy presented a financial statement of Twohy Brothers Company on the Orofino contract showing indebtedness for material and supplies of \$219,680.26. Witness criticized this, particularly with reference to nonpayment of bills more than a year old, and asked what had become of the money paid by the Railway Company, which at that time was a little more than a million and a half dollars. After Mr. James Twohy had left the Stevens car, witness discussed at length with Mr. D. W. Twohy what could be done to pull the job through, Mr. Twohy urging that additional allowances be made and witness explaining that he had made all the allowances that were due under the terms of the contract. Mr. Twohy made known that the Old National Bank of Spokane, of which he was chairman, had taken an assignment of the construction contract, and witness thereupon stated that he would not advance a large sum of money through the bank as long as

(Testimony of H. E. Stevens.)

the bank held this assignment. Witness finally agreed to arrange for \$100,000 additional to keep the Twohy Company on the job, as a matter of business expediency, providing his superiors would approve, and providing the assignment to the bank was released. For the purpose of making this allowance, [211] witness arranged to specially classify certain material at a fixed price of \$1.20 per yard. The contractor had claimed that there should be allowances on special classification, bridge items and other things which the chief engineer had declined to recognize, as not in his judgment allowable.

Between January 1, 1927, and the middle of April, 1927, bi-monthly advances were made. On March 25, 1927, Mr. Twory wired asking for an advance of \$30,000 from the retained percentage. This request was granted. At the end of March witness received a request through Mr. Tremaine for an additional \$30,000. Then Mr. Twohy made a verbal request on Mr. Tremaine for an advance of \$40,000. Witness directed Mr. Tremaine to decline this request. Mr. Twohy then wired, on April 8, 1927, urging that this advance be made and charged "adjustments due on bridge construction." Witness answered that he did not know of any adjustment due on bridge construction, and added:

"My agreement with you was that an advance of approximately \$100,000, plus bi-monthly estimates, would take care of your

(Testimony of H. E. Stevens.)

financial requirements. This advance has been made and is, I think, all the Railway Company should be asked to do toward relieving your financial stress."

On April 8, Mr. Twohy stated that the needs of his company were critical and thereafter Mr. James F. Twohy and Mr. D. W. Twohy went to St. Paul and explained that the Twohy Company was at the end of its resources and that unless the witness could find a way out for them, they would have to give up the job. After discussion, a plan for financing was agreed upon and a supplemental contract (Exhibit 19) was entered into. (This exhibit is not reproduced here because it is identical with Exhibit B attached to defendant's answer herein and admitted in plaintiff's reply.) [212]

H. E. Stevens' testimony (continued)

During the period from December, 1926, on, leading up to the \$100,000 advance, and then to the execution of the supplemental contract and the payments thereunder, nothing was said to witness by Mr. James Twohy or by anyone else representing the Twohy Company, about the contention that the contractor was entitled to handle the log traffic under the contract. From August, 1926, to June, 1927, the subject of log haul was not put up to witness by Mr. Twohy at all and was not discussed. During this period other matters of considerable importance, involving large money payments, were discussed with the Twohy Company.

(Testimony of H. E. Stevens.)

Mr. Twohy and Mr. Boss called on the witness in St. Paul in November, 1926, and there was no doubt some statement made to the witness to the effect that the bridge contractors were in trouble; and witness probably said that they were hollering before they were hurt; but witness did not make any reference to the log haul and did not say that the bridge contractors would make money on the log haul. The question of the log haul was very much taboo since the August meeting.

Witness no doubt made the statement that he did not care to make adjustments of the contract in the course of its progress, and that no one knew how a contract would show up in its final results. This statement no doubt was made in subsequent conferences, but no suggestion was ever made by the witness that the bridge contractors might make money or recoup losses by hauling logs.

About the middle of June, 1927, after witness had made a trip over the line under construction, Mr. Twohy rode to Portland with him in witness' railroad car, and on the [213] morning of June 23, in the language of the witness, Mr. Twohy "asked me what we proposed to do about the log haul, and I told him again very flatly that we proposed to handle the logs in our own trains with our own crews."

When Mr. Twohy visited witness in St. Paul in March, 1928, at the time settlement of all claims under the contract was discussed, Mr. Twohy did not have his claims in tangible form, and witness

(Testimony of H. E. Stevens.)

asked him to make him a written statement as to what objections he had to the final (estimate), if he had any, and he did so with a letter written in St. Paul, which is defendant's Exhibit A-10. In this letter the following statement was made:

"It has been suggested that perhaps your company felt justified in this procedure (taking over the log haul) because the amount of commercial business offered was larger than anticipated. As a matter of fact, in making our original price we did count on a substantial volume of this business. But in any event, surely any variation in the amount of business offered can not be held to vary the bargain, any more than 100 per cent increase in costly yardage quantities has been so considered."

H. E. Stevens,

Cross-Examination

Before the Railway Company took over the line from Orofino to Jaype the contractor had moved some commercial business. A few cars had been picked up and the contractor was paid \$1.00 per car mile for the movement. It is not customary for the Railway Company to charge the shipper the same amount paid to the contractor for cars hauled.

Witness did not anticipate that there would be any great amount of commercial haul even including logs for the Clearwater Timber Company. That was the reason the quantity [214] was estimated for

(Testimony of H. E. Stevens.)

Item 72 in comparing the bids. Witness never contemplated moving logs for the Clearwater Timber Company in any regular operation under a construction clause. Witness expected that an occasional car might be moved and assumed that it would be negligible in its effect upon the performance of the contract.

Witness had no information as to what spurs the Clearwater Timber Company might be constructing. The hauling of logs during construction was entirely within the control of the witness and witness never contemplated moving any substantial amount of logs or any other material until the line was practically completed. Witness felt that he made this clear in his letter of invitation to bidders.

At the meeting in Mr. Stevens' car at Orofino December 18-19, 1926, the contractor was presenting claims for a special classification of sticky material and for the placing of flattened timbers in bridges. He had compilations of figures in support of his presentation. These claims had been frequently made before that time. The figures presented by the contractor purported to show that it would cost the contractor about \$1.38 a yard to move the material for which special classification was claimed. At that time the witness refused to pass on these claims, asserting that they should wait until the end of the job to determine how the contractor's costs showed up and how much the job had cost the railroad. The claims for sticky material, for which special classi-

(Testimony of H. E. Stevens.)

fication was requested, had been frequently presented, and on each presentation the engineer asserted that it should be held in abeyance. The witness knew that [215] there was in fact an identifiable sticky material on the grade and the allowance for this material at \$1.20 per yard was for the approximate amount which the contractor actually moved. The same was true of the allowance for placing hewed timbers in bridges.

Witness was being urged to complete the line as soon as it was physically possible to do so although no promise had been made to complete the work at any particular time. The Timber Company had talked about possible damage to logs from borers and blue stain. Damage from blue stain occurs if logs are not placed in water prior to late summer of the year in which they are cut. The Timber Company started sawing August 8, 1927. Originally the Timber Company had urged that the logs be picked up and brought to destination at once, but when the hauling began, the Timber Company was not anxious for so much haste.

Witness, between August 3, 1926, and June 23, 1927, did take up the log haul question with general counsel Lyons for the defendant company, and this was prior to the making of the supplemental contract in April, 1927, and discussed the stop-work order given in July, 1927, before it was delivered but had not discussed the letter of August 3, 1926 (Defendant's Exhibit A-2), with General Counsel

(Testimony of H. E. Stevens.)

Lyons before the letter was written. From the time of Mr. Twohy's letter of August 17, 1926 (Plaintiff's Exhibit 32), nothing more was said about the log haul until June, 1927. On June 23 Mr. Twohy brought up the question officially. In the discussions at St. Paul leading up to the making of the supplemental agreement, the log haul question was not brought up by any representative of the Twohy Company and was not discussed. [216]

Testimony of

D. F. LYONS,

a witness called on behalf of defendant.

Witness is general counsel of Northern Pacific Railway Company and has held that position since July 1, 1925, having been an attorney for the Northern Pacific Company for nearly 19 years.

Witness participated in a meeting held in Mr. Stevens' office April 25 or April 26, 1927, at the time the supplemental contract was drawn. When witness arrived Mr. Stevens told him that Twohy Brothers were in difficulties again and he began to outline the situation in a general way. Thereupon Mr. D. W. Twohy made a complete statement explaining that the Twohy Company was unable to go on with its contract in that they were in financial difficulties and could not pay their bills. He ex-

(Testimony of D. F. Lyons.)

pressed regret over this and spoke of his long acquaintanceship with Northern Pacific officials and his pleasant, cordial relations with them, and particularly with Mr. Donnelly, the president. He stated that some arrangement would have to be worked out to take care of the situation, that Mr. Stevens had been extremely fair, and that he, Mr. Twohy, was perfectly willing to leave the matter to him, being confident that the Northern Pacific would do what was right. He stated that his one request was that some way be found for keeping the Twohys on the work, that they had had a long and honorable career as contractors and that it would be disgraceful if they could not be kept on the work. Witness was then told of the suggested plan for continuing the work, and after understanding what was wanted, witness went to his office and drew up a contract.

Mr. Stevens discussed his stop-work letter with witness in July and witness approved the form of letter. Mr. [217] Stevens never at any time referred to the witness the settlement of any dispute with the contractor arising under the contract.

D. F. Lyons,

Cross-Examination

Before witness arrived to receive instructions for preparation of the supplemental contract, the parties had apparently completed their negotiations and discussions of the matters involved. Witness does not recall ever hearing about the log haul question until

(Testimony of H. M. Tremaine.)

late in June or early in July, 1927, and has nothing in his files on this subject before July, 1927. Chief Engineer Stevens counseled with him before giving the stop-work order.

Testimony of

H. M. TREMAINE,

a witness called on behalf of defendant.

The contract for the construction of the Orofino-Headquarters line was drawn by Mr. Stevens, Chief Engineer of defendant's railroad.

When log hauling commenced in July, 1927, the log pond of the Clearwater Timber Company at Lewiston was not ready to receive logs. The bulk of the pond was not covered by water, the dam had not been completed so as to permit flooding or the use of the unloading facilities. Therefore the construction spur of the contractor engaged in building the dam was used to haul the logs across the dry floor of the pond to a high water channel. When this channel became filled with logs it was necessary to dump indiscriminately on the dry ground wherever the logs could be reached by teams or derrick; at places the logs stood five or six feet higher [218] than the track. They had to be skidded or lifted out, which was a very awkward process of unloading. This situation continued until January, 1928.

(Testimony of H. M. Tremaine.)

H. M. Tremaine,
Cross-Examination

Witness is not mistaken in his statement that Mr. Stevens' letter of July 12, 1927, came to him all dated and filled out. Witness does not recall any conversation with Mr. Horan or any statement that witness had a stop-work order with instructions to hold until an appropriate time for the purpose of keeping the contractor working on the end of the line under unit prices as long as possible. Witness remembers a conversation with Mr. Horan to the effect that the stop-work order was on the way; and witness asked Horan what the mechanics of the mutual operations would be when the stop-work order was issued.

If the Twohy Company had been permitted to continue work on the first 27 miles the expense of keeping the line open for traffic would have been repaid on the contract unit price basis. The yardage in the slides would have been returned in an estimate.

The first construction tariff was published in April, 1927, effective April 12, 1927. This tariff, which is plaintiff's Exhibit 166, was filed with the Public Utilities Commissioner of Idaho, applicable to intrastate traffic, and quoted a rate of \$2.95 per thousand feet on logs from Rudo, Jaype, Summit, and Headquarters, Idaho, to Lewiston and Gurney, Idaho. It was issued by "Northern Pacific Railway Company in connection with Northern Pacific Rail-

(Testimony of H. M. Tremaine.)

way Company (Construction Department)”, and contained the following explanation: [219]

“Rate named herein applies from points on newly constructed line and shipments will be accepted only subject to delay; to be moved by and at the convenience of the Construction Department until formal opening of the line, of which due notice will be given.”

Witness believes that the Lewiston mill started operation August, 1927, as a kind of preliminary tryout. There was no consecutive operation after that because there were stops for adjustments. This is usual in the opening of a sawmill of any size, according to witness' observation.

Witness does not know that the logs were taken down the log pond over the protest of the Clearwater Timber Company but believes that the reverse is true. The Clearwater Timber Company was not urging the witness individually to bring logs in. Cars were turned over to the witness at Orofino with instructions from the Railway Company to take them up for loading. The actual loading was performed by the Clearwater Company. There were differences of opinion as to the rate of loading but witness believes that the Clearwater Company, after July 17, was ready to load twenty to thirty million feet of logs which were piled at Jaype or in that vicinity. There were five men on the ground at Jaype to do the loading. Witness believes this loading equipment was placed sometime in June but does not know how

(Testimony of H. M. Tremaine.)

long before July 17 the crews were there. On cars handled by Twohy Brothers for the transportation of commercial freight no rental was charged and no such charge was set up against Twohy Brothers in the rental claims presented.

There were logs along the right of way which had been cut during the clearing in the winter of 1925-1926 and the spring of 1926. The pine logs were badly damaged and [220] were not accepted by the Clearwater Timber Company but were paid for by the railroad company. Such of these logs as were salvaged were skidded up and picked up by the cherry picker. Those cut on the Clearwater lands were turned over to the Clearwater Company. Logs in the lower end generally were disposed of by witness, those that were salvaged, logs from the upper end being substituted for those belonging to the State.

When the right of way was bought from the Clearwater Company it was assumed that the timber was included. Later there was a difference of opinion about this and after discussions a payment of \$10 per thousand feet was made. This was mostly white pine although there was some cedar. The yellow pine was not generally in good condition.

The Twohy Company hauled the cars in which these picked-up logs were transported. This was prior to the effective date of the first tariff. Witness thinks that this movement was not very substantial. Payment was made at the rate of \$1.00 a car mile,

(Testimony of H. M. Tremaine.)

loaded and empty. Nothing was collected from the owners. The tariff rate at that time covered only the haul from Orofino west. After July 17, 1927, until the end of the year, the revenue from the commercial haul accrued to the construction department of the Northern Pacific Company.

In the late summer or fall of the year 1926, witness told Mr. James Twohy and Mr. Boss that if there was any place under the contract at which he might look for relief he might use the special classification clause because of the sticky material encountered. At some seasons of the year this material was much more expensive to handle than [221] solid rock. It was a bouldery clay, that is, a clay heavily filled or interspersed with boulders of various sizes, and contained mica. In wet seasons it was very runny and would not stay within any confines, and track could be maintained on it with difficulties, trucks would mire down, and it was altogether a slippery unsuitable material. Witness made an estimate of the amount of this material in the fall of the year 1926, and found that up to that time they had encountered 199,591 cubic yards of the sticky stuff, and the total accounted for finally was 220,000 cubic yards. The estimate was made for the purpose of assisting Mr. Twohy in presenting his claim for special classification to the chief engineer, and formed the basis for Twohy Brothers' claim of \$1.38 per cubic yard. The witness probably had a

(Testimony of H. M. Tremaine.)

good many conversations with Mr. Boss about this material. At the meeting in the car of Mr. Stevens at Orofino December 18-19, 1926, Twohy Brothers presented claims to have a special price made for placing timber under water, for placing hewed timbers and for moving this sticky or gumbo material. It was at all times the opinion of the witness that the item for hewed timber had no price fixed in the contract and that a special price would have to be made to cover installation of that timber.

STATEMENT OF DEFENDANT'S
EXCEPTIONS

II.

During the progress of the trial of the cause and before final submission thereof, defendant moved the Court for an order making and adopting the following, among other, findings of fact and conclusions of law: [222]

Requested Findings of Fact

“XVIII

“During the progress of the work a dispute arose between plaintiff and defendant as to whether or not the unit prices in the contract applicable to so-called team haul were applicable for all bridge materials over the newly laid track. Plaintiff hauled by rail the timber and piles and metal fastenings described in the

complaint. Defendant denied that the so-called team haul prices were applicable thereto and paid plaintiff for such hauling at the rate of \$1.00 per car mile.

The dispute between the parties was submitted to the chief engineer during the progress of the work under the provision of the contract making the chief engineer the umpire to decide such questions. Upon such submission, the chief engineer of defendant determined that the price to be paid for the transportation of said bridge materials was the rail haul price of \$1.00 per car mile."

The Court refused to make the foregoing special finding of fact and to such refusal defendant reserved an exception, which was duly allowed by the Court, said exception being in words and figures as follows:

"To the decision and order of the Court refusing to make and enter Finding of Fact No. XVIII in the form duly requested by defendant prior to the time of final submission of this cause to the Court."

"XIX

"After the chief engineer of defendant had so decided the question in dispute between the parties relating to the rate applicable to haul of bridge materials, plaintiff accepted said decision and acquiesced therein."

The Court refused to make the foregoing special finding of fact and to such refusal defendant reserved an exception, which was duly allowed by the Court, said exception being in words and figures as follows:

“To the decision and order of the Court refusing to make and enter Finding of Fact No. XIX in the form duly requested by defendant [223] prior to the time of final submission of this cause to the Court.”

Requested Conclusions of Law

“VI

Plaintiff was not entitled, under the terms of its contract with defendant, to receive compensation for bridge materials hauled by rail at prices applicable to so-called team haul. The term ‘team haul’ as used in the contract meant transportation by team, truck, or by hauling on skid roads, and not transportation by rail upon the newly laid track.”

The Court refused to adopt or enter the foregoing conclusion of law, and to such refusal defendant reserved an exception which was duly allowed by the Court, said exception being in words and figures as follows:

“To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. VI in the form duly requested by defendant prior to the time of final submission of this cause to the Court.”

“VII

The dispute between the parties as to the price applicable to the hauling of bridge materials having been submitted to and decided by the chief engineer of defendant as umpire under the terms of the contract, the decision of the chief engineer is binding. There is no evidence to show that the chief engineer did not exercise an honest judgment in passing upon the dispute.”

The Court refused to adopt or enter the foregoing conclusion of law; and to such refusal defendant reserved an exception which was duly allowed by the Court, said exception being in words and figures as follows:

“To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. VII in the form duly requested by defendant prior to the time of final submission of this cause to the Court.” [224]

“VIII

“Plaintiff is not entitled to recover upon its claim for additional compensation for the transportation of bridge materials.”

The Court refused to adopt or enter the foregoing conclusion of law, and to such refusal defendant reserved an exception which was duly allowed by the Court, said exception being in words and figures as follows:

“To the decision and order of the Court refusing to make, adopt, and enter Conclusion of Law No. VIII in the form duly requested by defendant prior to the time of final submission of this cause to the Court.”

The Court, after submission of the cause and upon consideration thereof, and after the announcement of a decision therein, made and entered the following findings of fact and conclusions of law:

Findings of Fact

“XIX

The contract fixed prices for hauling certain materials, as follows:

Hauling piles furnished by the company per lineal foot mile,	\$.02
Hauling timber furnished by the company per thousand feet b.m. mile,	.85
Hauling metal fastenings per ton mile,	.65

These stipulations of the contract were breached by the defendant, who paid for hauling said materials at the rate specified in the contract for commercial hauling and refused to pay at the rate specified in the contract for hauling said materials. This material haul is not commercial haul and was intended to be compensated at the specified prices for material haul. The plaintiff hauled timber furnished by the defendant for which the plaintiff should have been paid \$47,253.99. The defendant has paid but \$20,410.52 of this amount,

leaving unpaid and due to [225] plaintiff on this item \$26,843.47. The plaintiff hauled piling furnished by the defendant for which the plaintiff should have been paid \$5353.78. The defendant has paid but \$660.49 of said amount, leaving unpaid and due to the plaintiff on this item \$4693.29. The plaintiff hauled metal fastenings (bridge iron and galvanized iron) furnished by the defendant for which plaintiff should have been paid \$2563.31. The defendant has paid but \$1313.62 of this amount, leaving unpaid and due the plaintiff on this item \$1249.69.”

Defendant thereupon duly reserved an exception to the conclusion and decision of the Court as stated in the foregoing finding of fact, which exception was allowed by the Court and was in words and figures as follows:

“To the conclusion of the Court as stated in Finding of Fact No. XIX that the stipulations of the contract between the parties fixing specified prices for hauling piles, timber, and metal fastenings were breached by defendant, and to the conclusion as stated in said finding of fact that said materials were not commercial haul to be paid for at the contract prices for hauling commercial freight.”

“XX

“The price to be paid to the plaintiff for hauling the materials mentioned in finding XIX

was not submitted to the chief engineer for decision, was not a matter for submission under the contract, and refusing to pay the contract price was not pursuant to the arbitration clause of the contract, but constituted an arbitrary and coercive use of an assumed power. There is neither pleading nor proof of estoppel against or waiver by the plaintiff."

Defendant thereupon duly reserved an exception to the conclusion and decision of the Court as stated in the foregoing finding of fact, which exception was allowed by the Court and was in words and figures as follows:

"To Finding of Fact No. XX to the effect that the controversy regarding the contract price applicable to the haul of materials (piling, timber, and metal fastenings) was not submitted to the chief engineer for decision under the arbitration provision of this contract, and [226] that defendant's refusal to pay the prices claimed by plaintiff was not in pursuance to a decision under said arbitration clause, but was an arbitrary and coercive use of an assumed power."

Conclusion of Law

(Abridged—for complete
conclusion see ante p. 190)

"II

Defendant breached its contract by . . .
refusing to pay to plaintiff the prices fixed in

said contract for hauling materials furnished by the company and to be used in the construction of said railroad, . . . Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

* * * * *

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers,	\$26,843.47
For hauling piling,	4,693.29
For hauling bridge metals,	1,249.69
without interest prior to judgment."	

Defendant thereupon duly reserved an exception to the conclusion and decision of the Court as stated in the foregoing conclusion of law, which exception was allowed by the Court, and was in words and figures as follows:

"To Conclusion of Law No. II that defendant breached its contract in the respects therein stated and that plaintiff is entitled to recover the amounts specified in said Conclusion of Law No. II."

The testimony hereinabove summarized under "Statement of Evidence—I", together with that hereinafter summarized, is the evidence necessary for a consideration of the questions of law involved in the rulings to which the foregoing exceptions were reserved: [227]

STATEMENT OF EVIDENCE—II

Testimony of

M. S. BOSS,

a witness called on behalf of plaintiff.

Witness met with chief engineer Stevens on the morning of October 15, 1925, in St. Paul and submitted the bid of Twohy Brothers. At noon of that day witness was advised that the contract had been awarded to Twohy Brothers. Thereafter in Mr. Stevens' office witness discussed with Mr. Stevens a number of price items which the latter desired changed. The bid sheet of Twohy Brothers showed Item 35 for hauling concrete pipe, and Item 36 for hauling corrugated iron pipe, as a price for team haul, while other items were for hauling with the word "team" omitted. The sheets which had come to Twohy Brothers in blank form for submitting bids and upon which these items were marked were retained by the railroad company. Twohy Brothers hauled corrugated pipe by truck, team and train and were paid the regular price of 85 cents for the train haul. Mr. Stevens suggested several changes in the prices in plaintiff's bid, and changed the words "team haul" to "hauling" in price items 35 and 36. Witness called the attention of Mr. Stevens to the fact that these were the only two items that called for team haul. Mr. Stevens said that should be overlooked and that the wording should be "hauling."

The Twohy Company, in the course of the work, hauled lots of corrugated pipe by truck, team and

(Testimony of M. S. Boss.)

train, and was paid at the regular price for hauling—85 cents a ton mile, regardless of the manner of hauling.

Bridge material was delivered in cars in the material yard at Orofino, the contractor being paid the [228] switching charges for hauling the car in, spotting it, and taking the empty out. The charge paid also includes the work of unloading. The work of sorting at Orofino was also covered by the hauling charge as well as the unloading at the material yard and the unloading at the bridge site. This work would be required whether the hauling was by rail or otherwise. Considerable sorting was required because the bridge timbers all came in mixed carloads. The foreman and two or three men on the car were required and also two or three men on the ground. The work of unloading cost about 75 cents a thousand feet. The cost of loading was about \$1.50 a thousand. Unloading at the bridge site had to be done carefully because the roadbed was narrow. This work cost about \$1.00 per thousand.

The Railway Company charged the contractor \$1.00 a day for flat cars used in hauling bridge materials, which would be 10 cents a day per thousand feet. Cars would be in service five or six days on the average in handling carloads of material from the yards to the front and back. The contractor had to pay for the work of making and placing car stakes. Witness computes the total of these cost figures (excluding actual train transportation

(Testimony of M. S. Boss.)

cost) at \$3.85 to \$3.95 per thousand, whereas the Railway Company paid \$1.80 per thousand.

M. S. Boss,

Cross Examination.

The change in the wording of price items 35 and 36 was made by Mr. Stevens, who drew a pencil line through the words "team haul" and wrote over them "hauling". Witness did not change plaintiff's copy to correspond. Witness [229] brought the question up because he wanted it understood that the haul might be by rail, truck, or otherwise; that is, the haul of concrete pipe and corrugated pipe was to be paid for at the specified prices no matter how it was hauled, so all hauling would be uniform. Hauling of bridge materials was in fact done with trucks, by team, and dragged by hand on sleds down the canyon slopes.

There was some corrugated iron pipe hauled in by train for which plaintiff got 85 cents per ton mile. Witness thinks 20 to 24 feet, more or less, was so hauled at station 1012, and 20 or 30 feet around station 1150, and also 24 feet at station 1231+; and some additional may have been hauled farther up. This occurred because the track was laid before the contractor was able to get the culvert pipe in. Ordinarily all culvert work would be done as the grade was built and the pipe would not be hauled in by rail. Rail haul would be far less expensive than hauling by team. Team haul of bridge

(Testimony of M. S. Boss.)

timbers would not be much more expensive than rail haul except that if the haul was for two or three miles ahead of the end of the track, it would be much more costly.

Testimony of

H. M. TREMAINE,

a witness called on behalf of plaintiff.

The total amount paid by the Railway Company for hauling bridge timbers was \$38,896. Payment was made at the price specified in item 38—85 cents per thousand f.b.m. except where the bridge timbers were hauled by train. For this hauling, payment was made under item 72 of the contract—\$1.00 per car mile. For the hauling of piles, the contractor was paid at the rate of 85 cents. [230]

Until January 12, 1927, the witness in making a record of movement of bridge material did not keep any record of the car numbers or amount of material in a carload, but had an agreement with Mr. C. C. Culliton, of the Pacific Utilities Company, on an arbitrary amount of material in a car as to the material for bridges 4, 5, 8, 11, 12 and 19.

Testimony of H. M. Tremaine

on Cross Examination.

After receipt of letter from Mr. Stevens in August, 1926, stating that payment for bridge material

(Testimony of H. M. Tremaine.)

should be under item 72, witness wrote Mr. Stevens expressing doubt as to whether the dollar a car mile provided in item 72 of the contract would apply to moving these bridge materials, that there was an omission in the contract and the chief engineer should name a new price to cover it. Plaintiff requested production of this letter from Mr. Tremaine to Mr. Stevens discussing the price for haul of bridge materials and defendant declined to produce it.

Testimony of

C. C. CULLITON.

Witness was a member of the firm of Culliton & Dibblee, which had the bridge contract. He did not have any agreement with Mr. Tremaine that the cars in which bridge materials were hauled prior to January 12, 1927, should be arbitrarily considered as having contained 12,000 feet per car, and did not have any understanding with Mr. Tremaine when the bridge work started in April that the bridge materials hauled to the bridges should be arbitrarily considered as having been hauled at the rate of 12,000 feet per car, and did not have any agree- [231] ment with Mr. Tremaine that the timbers hauled by cars to bridge 1 should be arbitrarily considered as having moved at the rate of

(Testimony of H. E. Stevens.)

12,000 feet per car, and did not have any conversation with him at all on that subject.

Testimony of

H. E. STEVENS,

a witness called on behalf of defendant.

When Mr. Twohy was in St. Paul on or about August 15, 1926, for the purpose of obtaining an advance of money from the retained percentage, witness Stevens raised the question of price for hauling bridge materials, and stated that he had received a letter from Mr. Tremaine about the claim for team haul (the letter is defendant's exhibit A-65, is from Twohy Brothers to H. M. Tremaine, assistant engineer, dated August 8, 1926, and is hereinafter set out). Witness had just told Mr. Twohy witness' position on the question of log haul and then "told him with equal emphasis that I didn't propose to pay team haul prices for material that was hauled by train; that we could consider those two questions settled."

Thereafter witness received Mr. Twohy's letter of August 17, 1926 (Plaintiff's Exhibit 32), which is not here reproduced because it appears in full at an earlier place in this bill of exceptions.

The discussion with Mr. Boss regarding the words "hauling" and "team haul" occurred in the afternoon of October 15, 1925, after the contract had been let to Twohy Brothers.

(Testimony of H. E. Stevens.)

The witness M. S. Boss is in error in the statement that he made a request to have items 35 and 36 changed so as to substitute the word "hauling" for the words "team haul." [232] Witness noticed in going through the Twohy proposal preparatory to drafting the contract that items 35 and 36 were not consistent with the balance of the hauling items. The words "team haul" were used with respect to concrete pipe and corrugated pipe, but for hauling piles, timber, etc., the word "team" was not used; and inasmuch as most of the hauling is now done by trucks and tractors, the word "team" is somewhat obsolete. So instead of changing all of the items to read "team haul", witness struck out the words "team haul" in items 35 and 36 so as to make them all read uniformly "hauling." Witness has no recollection of any statement by the witness Boss or as to any discussion with him regarding the applicability of these items to any kind of haul, including haul on the newly completed railroad.

The application of price item 38—85 cents per thousand f.b.m. per mile—to timber hauled by rail a distance of 15 miles, would result in paying the contractor \$12.75 per thousand feet per mile, or a total of \$191.25 for moving one car over the rails 15 miles and returning the empty car. Under item 72 (\$1.00 per car mile) the amount to be paid for such service would be \$30.

After the meeting with Mr. Twohy in March, 1928, in St. Paul, Mr. Twohy returned to Spokane,

(Testimony of H. E. Stevens.)

and later, in May, came back to St. Paul to reopen negotiations. He was accompanied by Mr. D. W. Twohy and several conferences were held. Witness next met Mr. Twohy in Spokane June 13, 1928. At this time complaint was made about the losses sustained by the Twohy Company. The amount of these losses was stated to be about one hundred and fifty thousand dollars. The Railway Company had a very close check on their expendi- [233] tures and the amount that we paid them, and witness had very carefully gone over that prior to meeting with Mr. Twohy and his party in Spokane, and when he arrived at the car, why, his claims had shrunk to about \$81,000. Witness told him that he thought he was still considerably too high, according to the check of his books made by the Railway Company auditor, and asserted that he had put in certain charges for handling gravel at the Riparia gravel pit and he had failed to credit himself with any salvage value whatever for a large amount of equipment that was left over from the job, so witness suggested that the equipment should be put in at about a scrap value of say \$21,000, or thereabouts, and when with all of these deductions his figure showed about \$35,000. Witness then said, "I think that is still nearly twice too high." Witness' figures at that time showed a loss between fifteen and twenty thousand, the exact figure witness believes being about \$19,000. The matter was discussed, pro and con, and witness finally said, "In order to settle

(Testimony of H. E. Stevens.)

all dispute as to who is right, as to how much you have lost, if any, I will pay you \$60,000 flat, and I will waive the bills that we have against you under the terms of the contract for rental of equipment, amounting to about \$22,000. I don't care where or how you allocate it, what you call it; I call it just one thing, and that is a final settlement on the Orofino job. I will pay that, and we will sign off and call it a day." And Mr. Twohy and Mr. Horan thought that over for a while and advised witness that they didn't think they could accept it. [234]

H. E. Stevens,

Cross Examination.

Witness considered item 72 would cover train haul of bridge material as distinguished from team haul, which would be covered by item 38. This had been applied to the haul of coast timber.

Witness did not anticipate that coast timber would be used if other material was found that could be used to better advantage, except for the decks of the bridges and except for Whiskey Creek Bridge, which was the largest bridge.

Before the Northern Pacific took over the line between Jaype and Orofino, the contractor had moved a few cars for different loggers and was paid \$1.00 a car mile by the Northern Pacific, but the Railway Company did not charge the shipper what it had paid the contractor; this was not customary since the railroad company could only

(Testimony of H. E. Stevens.)

charge the shipper whatever was provided by tariff.

Witness did not anticipate there would be any great amount of commercial business under item 72, even including logs for the Clearwater Timber Company, and therefore did not put in any quantity in his estimate under item 72 because in the first place there was no way of estimating it, and in the second place, witness never contemplated moving the logs for the Clearwater Timber in a regular operation under a construction clause.

Witness' estimate on the amount of coast timber covered by team haul was 30,847 thousand feet. Witness considered it debatable whether there would be team haul or not on some of these items, but anticipated there would be some rail haul by the contractor on coast timber for use in the bridges [235] and that this would be paid for under item 72. No quantities were set up or extended in the estimate for this because there was no means of ascertaining where the material yards would be located. It would be a guess at best and would not amount to any very considerable sum. Witness did, however, make an estimate of the average amount of team haul anticipated under item 38.

Witness changed items 35 and 36 from "team haul" to "hauling" in order to have the different items consistent, but did not make corresponding changes in the specifications. The term "hauling" and the term "team haul" are used rather interchangeably through the specifications.

Testimony of

H. M. TREMAINE,

a witness called on behalf of defendant.

DEFENDANT'S EXHIBIT A-65

is a letter received by witness from Twohy Brothers Company, dated August 8, 1926, reading as follows:

“Orofino, Idaho,
August 8th, 1926.

Mr. H. M. Tremaine, Asst. Engr.,
Northern Pacific Railway,
Orofino, Idaho.

Dear Sir:

In checking over July estimates we note that we have not been paid for the hauling of timber, metal fastenings and galvanized iron to Whiskey Creek, Bridge #1.

You have estimated 462,000 FBM of timber which you should pay haul on at 85¢ per M FBM, also on the iron used in this bridge at 65¢ per ton mile and 1950 lbs. of galvanized iron at 65¢ per ton mile.

Will you please arrange to have this allowed in August estimate.

Yours truly,

TWOHY BROTHERS COMPANY

By M. S. Boss.” [236]

DEFENDANT'S EXHIBIT A-66

is a letter written by witness to Twohy Brothers Company dated August 9, 1926. reading as follows:

(Testimony of H. M. Tremaine.)

“Orofino, August 9th,
1926.

Twohy Brothers Company,
Orofino, Idaho.

Gentlemen:

Acknowledging receipt of your of August 8th relative to payment for hauling of bridge material from the material yard to the site of erection.

I have referred this question to Mr. Stevens for his ruling and will advise you promptly on its receipt.

Yours very truly,

H. M. TREMAINE,

Assistant Engineer.”

DEFENDANT'S EXHIBIT A-67

is a letter written by Chief Engineer Stevens to witness, dated August 21, 1926, with notation that copy has been sent to Twohy Brothers Company, reading as follows:

“St. Paul, Minn.
August 21st, 1926.

Mr. H. M. Tremaine,
Assistant Engineer,
Orofino, Idaho.

Dear Sir:

Your letter of August 9th with copy of letter from Mr. Boss requesting payment on basis of team haul for material used in the Whiskey Creek Bridge.

Mr. James Twohy called on me last week and I advised him that we would be glad to pay

(Testimony of H. M. Tremaine.)

team haul for such material as was actually hauled by team and that for material hauled by train we would pay train haul as covered by item 72 of contract. You will further note there is a 4 mile limitation on the team haul item.

I think it was thoroughly understood, [237] both by the contractors and ourselves, how these clauses of the contract were to be interpreted and see no reason for raising the question at this time.

(Signed) H. E. STEVENS,
Chief Engineer."

H. M. Tremaine,
Cross-Examination.

Witness' material clerk did not keep the numbers of cars which transported timbers for bridge No. 1 but witness was not advised of this. Beginning January 12, 1927, directions were given that car numbers and exact dates be kept. The failure to keep the car numbers was not due to any interpretation that the Railway Company was to pay 85 cents per thousand feet per mile, regardless of the manner of hauling. Witness did not write to Mr. Stevens that the 85-cent price should be paid but told Mr. Stevens there was some doubt in his mind as to whether the item of \$1.00 a car mile in the contract specified by schedule 72, would cover this train haul, stating that he believed Mr. Stevens should name a new price, there being evidently an omission from

the contract. This was after the receipt of Mr. Stevens' letter stating that he had advised Mr. Twohy that the railroad would pay the \$1.00 per car mile rate.

LOCAL RULES GOVERNING BILLS OF EXCEPTION

Following are the rules of the District Court of the United States for the District of Oregon now in effect governing the preparation and allowance of bills of exception: [238]

Rule 41

“When an exception is taken, as provided in Rule 40, within ten days after judgment the party taking the same must prepare, in due form, a bill of exceptions, and deliver it to the clerk, for the judge, and serve a copy thereof on the attorney of the adverse party, who may, within five days thereafter, in like manner deliver and serve amendments thereto, and within five days thereafter the party taking the exception may serve a notice upon the attorney of the adverse party, to the effect that he objects to the amendments, and will, at a time not less than three nor more than five days thereafter, apply to the judge at his chambers to settle and sign the bill of exceptions.

If a bill of exceptions is not delivered and served in due time, the exceptions will be

deemed abandoned; and if an amendment thereto is not delivered and served in due time, the bill of exceptions will be deemed assented to; and if such an amendment is delivered and served and no notice of objection thereto is thereafter duly served by the party taking the exceptions, the same will be deemed assented to by said party."

Rule 42

"A proposed bill of exceptions, and the amendments thereto, if any, are to be considered and submitted to the judge for examination and allowance, without any further notice or action by either party, whenever, according to Rule 41, such bill, or bill and amendment, is to be taken as assented to by the adverse party; and when the same is found or made to conform to the facts it will be allowed and signed by the judge and directed to be filed."

CERTIFICATE OF SETTLEMENT AND ALLOWANCE

I, the undersigned, United States District Judge, who presided at the trial of the above entitled cause, do hereby certify that the foregoing bill of exceptions is a true and correct record of exceptions reserved by defendant upon the trial of the cause, and of all material facts, matters, proceedings, and rulings occurring upon the trial of [239] the cause

and not heretofore a part of the record herein, pertaining to and necessary for an understanding and for consideration of the questions of law involved in each of the rulings to which such exceptions were reserved.

I further certify that the foregoing bill of exceptions contains all of the evidence adduced at the trial of the cause and all of the exhibits offered in evidence upon the trial, pertaining to and necessary for an understanding and for consideration of the questions of law involved in each of the rulings to which such exceptions were reserved.

I further certify that the foregoing bill of exceptions contains all local rules relating to the presenting, settling, and filing bills of exceptions, and to extensions of terms for such purposes, and also all orders made by me extending the time for presenting, settling, and filing of bills of exceptions herein.

I further certify that the foregoing bill of exceptions was duly presented to me for allowance and settlement on the 7th day of May, 1937, and within the time prescribed for that purpose, and during the term, as extended, in which judgment was entered in this cause; and I hereby settle and allow the foregoing bill of exceptions as a full, true and correct bill of exceptions in this cause and direct the same to be filed as a part of the record herein.

Dated this 19th day of May, 1937.

JAMES ALGER FEE

[Endorsed]: Filed May 19, 1937. [240]

And Afterwards, to wit, on the 19th day of May, 1937, there was duly filed in said Court, Plaintiff's Bill of Exceptions, in words and figures as follows, to wit: [241]

[Title of Court and Cause.]

PLAINTIFF'S BILL OF EXCEPTIONS

Be It Remembered, after the issues in the above entitled cause were made up, the court on September 17, 1929, passed an order referring said cause to Everett A. Johnson, an attorney at law, of Portland, Oregon, as auditor and special master, to make a preliminary investigation as to the facts, hear the witnesses, examine the accounts of the parties, and make and file a report in the office of the clerk of this court respecting the facts in the case, with a view to simplifying the issues for the court and jury, but not to finally determine any of the issues of fact in the action, the final determination of all issues of fact to be made by the jury on the trial, or by the court, if a jury is waived.

Thereafter witnesses were called before said auditor, their testimony taken, and the notes of such testimony transcribed, and the auditor in due course filed with this court his report.

Thereafter there was filed in this court and cause a stipulation waiving trial by jury, in the following language (omitting title of cause and signatures of attorneys):

“It is stipulated between the plaintiff and defendant that the above entitled cause may be tried and determined by the court, without the intervention of a jury, the parties hereby agreeing to waive a jury.” [242]

Thereafter there was filed in this court and cause a stipulation in the following terms (omitting title of cause and signatures of attorneys):

“It is stipulated that at the trial of the above cause the testimony of any witness given before the auditor may be read by either party from the transcript thereof, whether or not said witness is personally present in court, and whether or not such witness testifies in person at the trial. When so read such testimony shall be considered as testimony offered at the trial by the party who called such witness to testify before the auditor. If any part of the testimony of any witness given before the auditor is offered at the trial, all of the testimony given by such witness before the auditor shall be considered as included in the offer. All objections to testimony made during the hearing before the auditor shall be considered and ruled upon by the court, and exceptions to the court’s ruling will be considered as having been taken. No other objections to testimony shall be offered.”

Thereafter said cause came on to be heard before the court, without a jury, and the parties respectively called each witness called by such party

(Testimony of H. M. Tremaine.)

before the auditor, and offered the testimony as given before the auditor, including all documentary evidence, which disclosed the following:

MR. H. M. TREMAINE,

called as a witness by plaintiff, testified that he was the resident engineer in charge of constructing the Orofino branch railroad; that the contract for the construction of said road was drawn by Mr. H. E. Stevens, chief engineer of the Northern Pacific Railway Company. Witness identified the original of said contract, which was offered in evidence, and is the contract set up as Exhibit "A" to the answer of defendant. Said contract was signed by plaintiff November 18, 1925, and contains the following provisions:

"The Contractor agrees to furnish all labor, services and material for, except as may be hereinafter otherwise provided and to construct, complete and finish in the most thorough workmanlike and substantial manner in every respect to the satisfaction of the Chief Engineer of the Company, within the time hereinafter specified, and according to the specifications hereto annexed and made [243] part of this contract, the clearing, grubbing, grading, culverts, bridging, tunnels, track-laying and ballasting and all other work for which prices are hereinafter named on the branch line of the

(Testimony of H. M. Tremaine.)

Railway Company extending from Oro Fino to Headquarters in the state of Idaho.”

“Preliminary estimated quantities and classification, if shown on the profile, or furnished the Contractor, are approximate only and will in no way govern the final estimate. The Company reserves the right to increase or diminish the approximate estimated quantities without affecting the contract unit prices for the various parts of the work except as provided in the contract.”

MR. JAMES F. TWOHY

was called as a witness by plaintiff and testified that he is the secretary of plaintiff company; that the invitation to bid upon the Orofino railroad construction was submitted to plaintiff by Mr. H. E. Evans, chief engineer of the Northern Pacific Railway Company, by mail. Thereupon witness identified a letter dated September 18, 1925, from Mr. Stevens, chief engineer, to plaintiff, which was offered in evidence. To this offer plaintiff offered the following objection:

“The defendant objects to the admission of the proposed document, which appears to be a letter from the chief engineer of the defendant railway company to Twohy Brothers dated September 18, 1925, approximately a month before the execution of the contract. This is imma-

(Testimony of Mr. James F. Twohy.)

terial and not competent in support of any issue in this case.”

Said letter was marked as

PLAINTIFF'S EXHIBIT 21,

and is in words and figures as follows:

“Northern Pacific Railway Company
Engineering Department
St. Paul, Minn. Sept. 18, 1925.

Twohy Bros.,
1818 L. C. Smith Bldg.,
Seattle, Wash.

Gentlemen:

I am sending you under separate cover the following data: [244]

1—Print of sectional map showing in red location of proposed branch line railway from Oro Fino to Headquarters, Idaho; Oro Fino being a point on the Clearwater Branch 29 miles west of the junction of the Clearwater Branch with the Palouse & Lewiston Branch at Arrow.

2—Profile of proposed line in three sections: M. P. 0 to 15, M. P. 15 to 28, and M. P. 29 to 41.

3—400' to the inch scale map of the located line.

4—General description of the line taken from notes of Locating Engineer Chamberlin.

5—Complete set of construction specifications, including proposal blank.

6—Extra proposal blank for bidders record.

(Testimony of Mr. James F. Twohy.)

If you care to submit a proposition for the construction of this branch, please have your bid in my office on or before October 12.

You will note we have specified that work be commenced immediately on award of contract, and that bridging, grading and track laying be completed on or before June 1, 1927. Balance of work to be completed on or before September 1, 1927. This line is to be constructed for the purpose of handling logs and forest products from the Clearwater timber belt to the large mills to be constructed at Lewiston, in connection with the power development work now under way at that point.

The Clearwater Timber Company except to have their new mill at Lewiston ready for operation in the early part of 1927, and as this will represent a very large investment it is important that the railway be in position to deliver logs to the mill on its completion. We have therefore specified that the track laying shall be completed not later than June 1. This will put us in position to start delivery of logs and a little additional time can be allowed for the finishing, ballasting and completion of the railway.

For 26 miles out of Oro Fino this line lies in the steep and narrow canyon of Oro Fino Creek. At many points the line is inaccessible from either side of the creek, and equipment

(Testimony of Mr. James F. Twohy.)

and supplies will have to be handled along the canyon bottom.

It seems to me, therefore, the best opportunity of entering the canyon with equipment and supplies will be during the coming winter. Generally the snow in the lower slopes of the Clearwater is not excessive, and unless we get unusually severe weather conditions the equipment and supplies can be toted through the canyons on the snow; camps established, much of the clearing done, and everything lined up ready for starting the major construction promptly on the opening of spring. A good deal of the rock work through the canyon can perhaps be handled to best advantage by station men and a very fair start on the station work could be made during the winter months. In any event, it seems to me quite important that we get in the equipment, and camps established along the canyon, during the winter, as the roads in the spring are generally in very poor condition. [245]

From the upper end of the canyon to Headquarters the line will probably be inaccessible during the winter account of excessive snow.

You will note the bridging will be unusually heavy, there being 50 crossings of Oro Fino Creek in the 26 miles between Oro Fino and the head of the canyon. We have not yet reached final decision as to type of bridges and

(Testimony of Mr. James F. Twohy.)

method of construction, but at this time it seems quite probable that we will find it expedient and economical to construct a part of the bridges in temporary form in order to expedite the track laying. This temporary construction will be later replaced by long timber spans or second hand girders resting on timber bents supported on concrete pedestals or light concrete piers. Many of the crossings are on a very sharp angle with the Creek and in all probability crib construction in such cases would block such a large part of the channel that we will find it necessary to construct concrete supports.

Engineer Chamberlin suggests the possibility of installation of small portable saw mills for manufacturing bridge materials, etc. It is somewhat questionable if this can be done economically. However, it is a possibility which will be given consideration.

The town of Pierce, at the head of Oro Fino canyon, is an old placer mining camp, and the Creek at that point has been the scene of extensive placer operations. Material is a coarse gravel and it may be possible to obtain concrete and perhaps ballast material from this location, but our information at this time is not sufficient to enable us to state positively that this can be done. It however offers a possibility.

Our engineering parties, in charge of Mr. Sidney Jones, are now engaged in retracing the located center line. This work having been

(Testimony of Mr. James F. Twohy.)

completed through the canyon. You will note from the map that the balance of the line can be easily inspected from the highway, from Pierce to Headquarters, which is now in very fair condition for automobile travel.

Yours truly,

HES-ar

H. E. STEVENS''

Witness identified the profile referred to in said plaintiff's Exhibit 21, and testified that it under separate cover accompanied said letter of invitation. Whereupon said profiles were offered in evidence. To this offer the same objection was offered by defendant as was made to Exhibit 21, which objection is hereinabove quoted. Said profile was marked in three separate sections, the first 15 miles out of Orofino was marked plaintiff's Exhibit 22, from Mile 15 to Mile 28 was [246] marked plaintiff's Exhibit 23, and from Mile 28 to Mile 41 was marked plaintiff's Exhibit 24.

Witness then identified a document headed "Northern Pacific Railway Company, Orofino Branch, Clearwater County, Idaho, Description of Line", as a document that came with the profiles from defendant to plaintiff. The document was offered in evidence. Defendant made the same objection to this offer as was made to Exhibit 21 above quoted, and with the additional reason stated that "It is an attempt to vary the terms of the written contract thereafter made." Said document was marked plaintiff's Exhibit 25.

(Testimony of Mr. James F. Twohy.)

Witness further testified that the invitation to bid was accompanied by blank forms in duplicate upon which the bid prices for the various units of work were to be entered. Witness testified that the bid was made up by Mr. M. S. Boss, superintendent of Twohy Brothers Company, and that witness assisted in studying the figures made up by Mr. Boss.

MR. H. E. STEVENS

was called as a witness in behalf of defendant. Witness stated that he was chief engineer of Northern Pacific Railway Company during the period of constructing the Orofino branch and was at the time of the hearing Vice-President of said company; that the project of building a railroad from Orofino into the Clearwater Timber Company's timber holdings was a very old one with the Northern Pacific, which in 1909 put a preliminary survey for about 20 miles up Orofino creek; that from 1916 to 1925 there were intermittent negotiations between the railway company and the Clearwater Timber Company looking to the building of a railway out of Orofino; that in 1921 the timber Company put in an engineer, Mr. Chamberlin, who made a survey for a line which the timber company contemplated building. Thereafter Mr. Chamberlin and officers of the timber company met with officials of the Union Pacific Railway Company and the Northern [247] Pacific Railway Company in St.

(Testimony of H. E. Stevens)

Paul to discuss the possibility of constructing the railroad desired by the timber company. Conferences continued until the year 1925, early in which year the timber company suggested the possibility of working out a plan whereby it would assume part of the carrying charges on the proposed line. In early June of that year the railway company agreed that it would go ahead and build a railroad to the Clearwater Timber Company's holdings, a point in the vicinity of Headquarters. Whereupon the railway company ran surveys up other streams, and after these surveys were made there were further conferences resulting in the timber company concluding that the line ought to go up Orofino creek, where the Chamberlin survey had laid it. At that time witness had no data up Orofino Creek, other than the Chamberlin profile. The timber company was anxious to go ahead with the project for their mill at Lewiston, and witness was asked to get the line started immediately. Witness then stated, "That naturally forced the taking of bids on the Chamberlin profile."

Witness then sent out invitations to bidders with the letter of September 18, 1925. Witness sent other information to the bidders in addition to the letter of September 18, which is in evidence as Exhibit 21. He sent them a supplemental letter on October 5, 1925, sending plans and specifications for tunnels, and an additional letter on October 7 or 8 to correct an error in the proposal blank. The letter of October 5 was identified by witness and

(Testimony of H. E. Stevens)

offered in evidence by defendant and received without objection as defendant's Exhibit A-4, and the letter of October 7 or 8 was offered by defendant and received in evidence without objection as defendant's Exhibit A-5.

Evidence was offered tending to show that in accordance with the statement in said invitation (Exhibit 21), defendant transmitted and plaintiff received the data referred to in said letter of invitation as having been compiled in connection with the so-called [248] Chamberlin survey, consisting of a profile of location and computation of estimated yardage of material to be moved in constructing said proposed railway line, the number of bridges to be constructed and a mile by mile description of the line indicated on the profile. This description indicated the classes of material that would be encountered on the line surveyed by Chamberlin, warned that at certain locations on the line, as indicated by the Chamberlin survey, material was soft and would break back or slide, and that numerous crossings of Orofino Creek by bridge, as well as crossings of other minor confluent streams, would be necessary to avoid trouble from slides and break backs. Said report showed the line commenced at Orofino, ascending 2,574 feet from Orofino to the summit of the range of mountains intervening between Orofino and Headquarters, and then descending 449 feet from the summit to Headquarters. The length of the main line of road was 41 miles, as indicated on said report. It indicated

(Testimony of H. E. Stevens)

that the first crossing bridge would be required at the crossing of Whisky Creek at mile post 3.5 out of Orofino; that the first crossing of Orofino Creek would be at mile 5.8 out of Orofino; that between mile post 5.8 and mile post 10 out of Orofino there were 5 channel changes of stream to be made and four river crossings; that between mile post 10 and mile post 14 out of Orofino there were 11 river crossings and 2 channel changes, the line having entered the lower canyon of Orofino Creek at mile post 10. The Chamberlin report further stated with respect to the projected line between mile post 15 and mile post 20 out of Orofino:

“At mile 15 the line begins to make ascent on 2.2% compensated grade to a point just below the Old American Mine at Mile 20. From here up the walls of bare basalt rock get higher, the point bolder, oxbow heads heavier and more frequent, until, while using all curvature possible [249] it becomes a case of hit a point and cross, then hit and cross again; holding the grade line 20 to 50 feet above the water in order to get through at all. To hit the walls hard in an effort to eliminate bridges would in many cases create a mass of waste material that would fill the canyon.

At Mile 16 on the upper side of Bennett Canyon is the first tunnel, which is 100 feet long through a high rib of basalt, around which the creek makes a long crooked detour.

(Testimony of H. E. Stevens)

Mile 18 Rainy Creek

Mile 18.7 Cow Creek

On Mile 19 there are two falls in the river. Where the line crosses just above the upper falls the rock walls are only about 60 feet apart. On the six miles from Mile 14 to 20 are 25 crossings of Orofino Creek, being half the total crossings on the line. All material is solid and slide basalt rock. River bottom heavy gravel, rock and boulders. Tote road will hold high up on north side."

The report indicated 50 crossings of Orofino Creek, 11 crossings over Quartz Creek, and other bridges over gulches and tributary drainage, bring the aggregate number of bridges to 71.

The evidence further tended to show that Engineer J. A. Chamberlin had not made his location survey, profile and estimates as an employee of defendant; that said engineer was an employee of the Clearwater Timber Company for whom he made said survey and report; that the projected railroad was being constructed by defendant as a result of negotiations between it and Clearwater Timber Company to move logs of the timber company which undertook a part of the carrying charges of the cost of constructing the railroad.

The evidence further tended to show that the railroad location, as made by Engineer Chamberlin, had all of the essentials of a final location, with grade, curvature and yardage given. It indicated a total yardage to be moved of 1,078,000 cubic yards,

(Testimony of H. E. Stevens)

of which 708,000 cubic yards was solid rock, 144,875 cubic yards was loose rock, and 225,220 cubic yards was common earth. The evidence further tended to show [250] that plaintiff in constructing said railroad actually moved a total of 2,057,575 cubic yards of material, of which 1,164,987 cubic yards was solid rock, 473,965 cubic yards was loose rock, 149,078 cubic yards was hardpan, 224,251 cubic yards was a spongy conglomerate (for which extra unit compensation was awarded) and 43,853 cubic yards was common earth.

The evidence further tended to show that after plaintiff began work on said railroad many of the crossings of Orofino Creek by bridge were eliminated by defendant and embankments substituted therefor, in many instances requiring the making of new channels for Orofino Creek, and laying the railroad in the old creek channel.

There was evidence tending to show that plaintiff made its bid upon the amount and character of work indicated on the estimate made by Engineer Chamberlin; that the several bids were computed and totaled by defendant's chief engineer on the basis of the said Chamberlin survey and estimate; that field engineers of defendant cross-sectioned the Chamberlin survey in the field and started the construction work in accordance with this cross-section; that plaintiff sublet all of the work, plaintiff maintaining complete supervision thereof; that each subcontract was submitted to and approved by the defendant's chief engineer, and that numer-

(Testimony of H. E. Stevens)

ous copies of the said Chamberlin profile and report provided by defendant were used in subcontracting the work.

There was evidence tending to show that the Chamberlin profile showed limited solid rock between the town of Orofino and the entrance to the canyon of Orofino Creek, with much solid rock work in said canyon and much bridging, and approximately 24 changes of the channel of Orofino Creek; that in the construction of said railroad there were 24 new [251] and additional changes of channel of Orofino creek not indicated on the said Chamberlin profile; that above said canyon the solid rock work was again limited in quantity; that the first 15 miles from the town of Orofino was sublet to one contractor, Rumsey & Jordan; that the work through the canyon of Orofino creek was sublet in comparatively small stretches to a number of subcontractors, and the work from the upper end of Orofino canyon to Headquarters was let to one contractor.

Under the order of reference to the auditor the latter had no authority to pass upon the admissibility of evidence or to rule upon objections, but merely noted the objections when made. Under the stipulation hereinabove quoted for submitting the case to the court upon the testimony taken before the auditor the objections made to testimony offered before the auditor were continued before the court. The court did not rule upon the admissibility of the evidence to which objection was

(Testimony of H. E. Stevens)

offered as hereinabove noted, nor upon the objections thereto, until the time of rendering his oral opinion, when the court limited the foregoing evidence in connection with the contract to establishing the general course of the projected road to be from the town of Orofino to Headquarters, through the canyon of Orofino creek, and rejected said evidence as representations of the line and grade of said railroad or the amount and character of work to be performed under the contract. To this ruling plaintiff duly excepted, which exception was in the following language:

“Plaintiff excepts to the rejection of evidence of the so-called Chamberlin survey and estimates as representations of the amount and character of work to be done by contractor.”

and which exception was duly allowed by the court.
[252]

Plaintiff requested the court to make the following finding, being request number I, which request the court refused:

“The due making of the contract involved in this case is conceded by both parties, and a copy of such contract is attached to the answer of the defendant. The contract was entered into as a result of an invitation by the defendant to the plaintiff to bid on the construction of a line of railroad from Orofino to Headquarters in the State of Idaho, which was and

is a distance of approximately forty-one (41) miles. The invitation given by the defendant was accompanied by representations that such line of railroad would be located and constructed in accordance with a profile thereof prepared by a certain locating engineer by the name of Chamberlin. The profile mentioned represented and stated the line of railroad with its degrees of curvature, its grade and all usual information connected with a definite location of a line of railroad, including a statement of the amount of material to be moved, the number of bridges to be constructed, the number of channel changes of Orofino Creek to be made, the number of tunnels to be bored, and a full and complete description of all the work to be done. The invitation to the plaintiff from the defendant further represented that any bridges built would be with a foundation of rock filled cribs or concrete pedestals supported by cribs." [253]

To the refusal to make said finding, plaintiff duly reserved the following exception:

"Plaintiff excepts to the refusal of the court to find that said Chamberlin survey and estimates were a representation by defendant as in requested finding number I."

which exception was duly allowed by the court.

Plaintiff requested the court to make the following finding, being request number IV, which request the court refused:

“The line of railroad provided to be constructed under the contract mentioned and found was through a rough piece of country beginning at the entrance of a narrow canyon of Orofino Creek which has high and steep banks. The time elapsing between the date of the invitation from defendant to plaintiff to bid for the doing of the work and the date upon which the bid of plaintiff for same was required to be made and was made was in fact insufficient for the plaintiff to make a full and complete survey and examination of the proposed work, and the problems and obstacles which might be encountered in the performance of same. Plaintiff did make such examination as the time permitted, but by reason of the shortness of time for such examination was compelled to and did rely in the main as to the work to be done upon the representations by defendant as to the nature and character and amount of work to be done and the location of same.”

To the refusal to make said finding, plaintiff reserved the following exception:

“Plaintiff excepts to the refusal to give *and* other modification of plaintiff’s requested instruction number IV and particularly to the refusal to find that plaintiff was compelled to and did rely upon representations made in the preliminary invitations to bid as to the character and amount of work to be done.”

which exception was duly allowed by the court.

Plaintiff requested the court to make the following finding, being request number VI, which request the court refused:

“The defendant informed plaintiff to base its bid on the requirement that the performance of the contract would require the construction of seventy-one (71) bridges of which approximately fifty (50) would be in the narrow canyon of Orofino Creek so placed as to permit the construction of a line of railroad to avoid the necessity of cutting off the steep points of land in the sides of the canyon to any extent greater than an absolute minimum. The [254] engineer, Chamberlin, had advised defendant, and such information and advice was communicated to plaintiff, that cutting off too much of said points would be unwise and would result in a very large quantity of waste material. Also, plaintiff was informed and advised to base its bid on the requirement of construction or making of approximately twenty-four (24) channel changes in Orofino Creek, which changes were in comparatively flat territory and of small import and not difficult to construct. No special price was provided in the contract for these channel changes.”

To the refusal to make said finding, plaintiff reserved the following exception:

“Plaintiff excepts to the refusal of the court to make plaintiff’s requested finding number VI or something equivalent thereto as necessary to an understanding of the work contracted for and actually required to be done.”

which exception was duly allowed by the court.

Plaintiff requested the court to make the following conclusion of law, being request number I with respect to conclusions of law, which request the court refused:

“The contract between plaintiff and defendant was to construct a railroad between Orofino and Headquarters in the State of Idaho substantially in accordance with the profile and representations upon which plaintiff bid, subject to incidental adjustments as work progressed.”

To the refusal to make said conclusion of law, plaintiff reserved an exception, which exception was duly allowed by the court.

The court made the following finding of fact, being number VI:

“At the time plaintiff and others were invited to submit bids for the purpose of a proposed contract, defendant delivered to plaintiff and other prospective bidders, maps, profiles, and other data showing the proposed route of the railroad to be built as theretofore located and surveyed, with the locating engineer’s estimate of quantities of material to be re-

moved, and other information. Such preliminary data did not purport to fix definitely the location of the line to be built or the amount or extent of construction work to be done, but did indicate the route to be followed by the proposed railroad." [255]

To the making of said finding of fact, plaintiff reserved the following exception:

"Plaintiff excepts to finding of the court number VI in so far as said finding holds that the maps, profiles and engineer's estimates submitted with invitations to bid did not represent the amount or extent of construction work to be done and the general location of the work."

which exception was duly allowed by the court.

The court made the following finding of fact, being number VII:

"In the construction of the railroad there were two instances in which a change of line was directed by defendant. This resulted in leaving the route originally surveyed and constructing the line upon a different location. There were many other instances in which the line was not constructed exactly as indicated by the location survey, and the number of bridges built and the number of channel changes made differed from those indicated by the preliminary data supplied to bidders. But the work actually done by defendant was

the work contracted for and was not a change of the line and grade of railroad contracted to be built, or of the work embraced in the contract."

To the making of said finding of fact, plaintiff reserved the following exception:

"Plaintiff excepts to finding number VII in so far as said finding holds that the maps, profiles and estimates submitted with the invitation to bid did not constitute a representation as to amount, quantity and location of work that became a misrepresentation when the work actually required was in excess thereof and departed therefrom."

which exception was duly allowed by the court.

The court made the following finding of fact, being number VIII:

"Plaintiff in the performance of the contract handled a much greater amount of yardage than that shown by the estimates made by the locating engineer and shown on the preliminary data supplied to plaintiff and other prospective bidders prior to the making of the contract. But the yardage so handled by plaintiff was the work which it contracted to do at the unit prices applicable and was not additional work resulting from any change in the line or grade of railroad or the amount of work embraced in the contract." [256]

To the making of said finding of fact, plaintiff reserved the following exception:

“Plaintiff excepts to finding number VIII in so far as said finding holds that the increased yardage and other work which plaintiff was required to do over and above that represented in the preliminary profiles, maps and estimates submitted with invitations to bid was the work which it contracted to do and was not additional work or a change in the amount of work embraced in the contract.”

which exception was duly allowed by the court.

There was further evidence tending to prove that the contract between plaintiff and defendant was in words and figures as in the document attached to the answer of defendant as Exhibit “A”; that said contract was prepared by defendant; that it was discussed between the parties at St. Paul, Minnesota, about October 15, 1925; that about said date plaintiff was advised that the contract would be given to plaintiff and plaintiff immediately began assembling men and equipment, was on the job in Idaho within a few days thereafter and a week before the defendant’s resident engineer arrived on the scene; that before submitting its bid plaintiff ascertained that subcontractors and machinery were available, and discussed the work in detail with the defendant’s chief engineer at the time and immediately after plaintiff submitted its bid, and that plaintiff likewise adopted and submitted to said chief engineer a definite plan for accomplishing

the work within the time stipulated in the contract; that said plan involved the immediate beginning of work, and that said plan was approved by said chief engineer; that plaintiff was adequately equipped and manned for the work outlined in the data submitted with the invitation to bid. [257]

There was also evidence tending to prove that defendant did not have trackage arrangements made to Orofino to handle plaintiff's equipment, and that plaintiff had to construct this trackage after it got its equipment on the ground; that defendant had made no arrangements for camps for its station engineers on the job, of which there was one engineer for each subcontractor, and plaintiff had to construct said camps; that defendant had failed to acquire rights of way for its projected road on the lower end, and plaintiff was compelled to shift its crew of workmen from one point to another because intervening rights of way had not been acquired by defendant, at a considerable loss of time; that a bridge program was not developed until late, and plans for bridges were delivered to plaintiff piecemeal through the summer of the year 1926; that defendant did not advise its bridge engineer of a large overrun of yardage on the lower end of the projected line, nor of the proposed elimination of many bridges, and that the preparation of plans for bridges actually constructed was delayed thereby; that defendant's arrangements with the Clearwater Timber Company for right of way through the latter's premises required defendant to preserve for the Clearwater Timber Company

the logs cut from the right of way; that between September 1926 and April 1927 extreme winter conditions prevailed in the mountains through which the road was projected; Orofino Creek was filled with ice, and subjected to freshets of unusual proportions, which threatened to carry away the said Clearwater logs; these hazards came frequently, and on those occasions defendant directed plaintiff to put all plaintiff's men (bridge crews, construction men, tracklaying crews) to work protecting the line against damage from log jams caused by these Clearwater logs banked within the reach [258] of the floods; that these demands caused frequent interruption of plaintiff's work, and consumed 17,000 man hours of time.

There was evidence tending to prove that the lower end of the contracted line (that heading out of the town of Orofino) was of strategic importance in controlling movement of freight and materials for use in the construction of the projected line of railroad in and beyond the canyon of Orofino Creek; that the schedule of work under plaintiff's plan approved by defendant's chief engineer called for this strategic section of construction (sublet to Rumsey & Jordan) to be completed by July 15, 1926; that the Chamberlin profile and survey of this sector represented that 352,425 cubic yards of material would be required to be moved in constructing it; that upon this profile the subcontract was let and plaintiff's plan of work developed; that when the work on this sector was completed

Rumsey & Jordan had moved 635,842 cubic yards of material.

There was further evidence tending to prove increases in yardage over that represented upon the Chamberlin survey throughout the entire line of railroad; that the increase was gradual, and information of changes that would increase yardage was given to plaintiff piecemeal; that the resident engineer of defendant failed to furnish plaintiff with the revised estimates of total yardage to be moved; that as early as March 1926 the resident engineer became convinced there would be a considerable overrun in yardage, but did not advise plaintiff thereof; that on the first 15 miles contracted to Rumsey & Jordan plaintiff had moved 355,000 cubic yards of material by June 30, 1926; 410,000 cubic yards by July 31, 1926; and 480,000 cubic yards by August 1, 1926. [259]

There was further evidence tending to prove that in the course of the work defendant made many changes from the work indicated on the Chamberlin survey furnished to plaintiff; that a tunnel was changed to an open cut at a great increase in work; that at one location the line was shifted back and forth delaying the work several months; that a cut was widened piecemeal, with workmen hanging by ropes to reduce the slopes; that the line was shifted from one side of Orofino Creek to the other, requiring plaintiff to move heavy machinery and prepare for different haul of waste; that at mile 28 the entire job was changed from team work to heavy rock work, after teams and supplies were

on the job; that the route and grade of the line were completely changed above Orofino Canyon, compelling the contractor to shut down and haul supplies in winter over difficult roads; that several years after the line was completed inspection on the ground disclosed line changes, abandoned cuts, evidences of shifting the line back and forth; that a road grade 100 feet wide was developed in some places, which plaintiff claimed was due to indecision of the resident engineer, resulting in shifting the line back and forth; that the Engineer Chamberlin in his report on the projected line warned against cutting deeply into the rocky points of Orofino Canyon because of the slides that would be caused thereby; that the canyon is one of the roughest known to the experienced engineers who testified; that defendant by eliminating bridges and substituting channel changes and embankments therefor cut deeply into many rocky points, sometimes cutting into the hill as much as 55 feet, resulting in mud slides and break backs that plaintiff had to move; that a slight change of center line of grade, as much as 1 foot, in precipitous rocky points, could increase the yardage at that place 1000 per cent. [260]

There was further evidence tending to prove that in eliminating bridges indicated on the Chamberlin survey defendant required plaintiff to make approximately 22 changes of the channel of Orofino Creek, in addition to those indicated on the said survey; that this was accomplished by cutting a new channel out of the abutting mountain and filling in the

old creek channel for road bed; that some of these new channels were cut to a depth as great as 70 feet, that required plaintiff to elevate the rock and earth in removal, and forced men to work in water; that some of these channel changes were difficult to execute and delayed the work many months; that the channel changes indicated on the Chamberlin profile were light, on flatter ground, and easy to construct; that the changes in line from that indicated on the Chamberlin survey did not begin until work on the contract had progressed several months.

There was further evidence tending to prove that plaintiff had a feasible plan of work approved by defendant's chief engineer that would have enabled plaintiff to complete the work within the time fixed in the contract if the work did not materially depart from that indicated on the Chamberlin survey; that this plan scheduled completion of grading work by the several contractors (naming them in the order of the location of their contracts beginning at Orofino) as follows:

Rumsey & Jordan	July 15, 1926
McVicar & Murphy	June 1, 1926
Bennett & Twohy	July 1, 1926
Schacht & Co.	July 30, 1926
Worth & Co.	September 1, 1926
Yeatman & Jackson	October 1, 1926

That this plan contemplated grading work in the winter of 1925-1926, but not in the winter of 1926-1927; that by October 1, 1926, [261] plaintiff in

performing its contract had moved a total yardage of 1,300,000 cubic yards; that almost arctic conditions prevailed in the Orofino Canyon in winter, and the winter of 1926-1927 was unusually severe; that under such conditions railroad construction work is very difficult, the efficiency of men being reduced approximately 50 per cent; that the monthly estimates made by defendant show that plaintiff in performing its contract with defendant moved 441,297 cubic yards of material between October 1, 1926, and March 31, 1927; that some of this winter work consisted of three of the more difficult new channel changes of the channel of Orofino Creek; that four of the larger channel changes were on the Rumsey & Jordan contract at the lower end of the projected railroad line, and three of them were performed in the winter of 1926-1927, and greatly delayed work on the contract above the points where these channel changes were being made.

There was further evidence tending to prove that early in the year 1926, when defendant began developing in construction work changes from the work indicated on the Chamberlin survey, plaintiff advised defendant that extensive changes would "bust" the schedule of work laid out; that claims for extra cost of work were made by plaintiff, but defendant's chief engineer requested that all claims wait until the end of the work.

There was further evidence tending to prove that the bridge plans adopted by defendant resulted in the construction of a number of bridges in Orofino

Canyon from the end of rail; that plaintiff was required to set mud blocks under water on leveled surface with dowel holes bored in the blocks to receive the bents, this work being done in the summer season; that delays in getting the track laid to the bridge heads threw the erection of bents and superstructure on a number of bridges into the winter of 1926-1927, when the work of erecting the superstructure was performed [262] under very difficult conditions, men seeking the dowel holes in mud sills under icy water, occasionally at such depths that diving suits were used, the weather being so severe that a man could remain in the water but a few minutes at a time; at times the water was so deep that the workmen entering the water had to do so with a cable from the shore attached to the workmen's waists.

There was further evidence tending to prove that plaintiff's performance of the contract was delayed in part by the conditions and circumstances hereinabove referred to, and the contract was not completed by September 1, 1927, but defendant permitted plaintiff to continue performance beyond said date.

Under date of July 8, 1927, defendant directed to plaintiff a letter notifying plaintiff to stop work covered by the contract between Orofino and Jaype Siding (which was approximately at mile post 21.25) on July 16, 1927; in said letter plaintiff was directed to continue work, in the following language:

“You will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16.”

Plaintiff continued work on its contract, and on October 7, 1927, defendant served on plaintiff another notice directing plaintiff to stop all work covered by the contract between the west switch of Jaype Siding and the east switch of Summit (which was approximately at mile post 33.7) on October 12, 1927; in said letter defendant again directed plaintiff as follows:

“You will proceed with the completion of the contract work west of the east head block of Summit Siding, confining your operations to that portion of the line after October 12.”

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When the invitation to bid for a contract to construct the line of railroad involved was sent to plaintiff it was accompanied with a form of proposal containing certain items for which bids were asked, among which was the following:

“Handling, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and in service of other contractors, to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded

car return to the operated lines of the Company, per car mile, * * *

The contract of the parties (Exhibit 9) provides that

“The Contractor agrees to furnish all labor, services and material for, except as may be hereinafter otherwise provided, and to construct, complete and finish in the most thorough workmanlike and substantial manner in every respect to the satisfaction of the Chief Engineer of the Company, within the time herein specified, and according to the specifications hereto annexed and made part of this contract the clearing, grubbing, grading, culverts, bridging, tunnels, tracklaying and ballasting and all other work for which prices are hereinafter named on the branch line of the Railway Company extending from Orofino to Headquarters in the State of Idaho.”

“The work is to be commenced immediately and the grading, bridging, tunnels and tracklaying are to be completed on or before June 1, 1927, and all work on or before September 1, 1927.”

Included in the work for which prices are named in the contract is the item therein numbered 72, which provides for

“Handling, prior to date line is turned over to Operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service and

in the service of other contractors, to include all necessary switching and spotting and apply to empty car movement from point of origin of the empty car to the loading site and loaded car return to the operated lines of the Company, per car mile - - - - - \$1.00.” [264]

In the contract specifications are the following provisions:

“6. Contractor shall handle with his own work train, prior to date line is turned over to operating Department of the Company, all commercial business, material and empty cars of the Company used in commercial service, and in the service of other contractors. The specified contract price per car mile to include all necessary switching and spotting, and apply to empty car movement from point of origin of the empty car to the loading site, and loaded car return to the operated lines of the Company.

“15. * * * After the track has been in service and before the acceptance of same, all bolts must be gone over again and have nuts turned up tight.

“19. * * * Side tracks or spurs put in by the contractor on his own initiative shall not be paid for, and shall be removed by the contractor on the completion of the work without expense to the Company.

“22. Running surface consists of putting track into condition to preserve the rail, fast-

enings and expansion from injury by the passing of construction or other trains until such time as ballasting is done. * * * Running surface shall be made and maintained by the contractor without expense to the Company.

“26. * * * Track shall be well lined and have a smooth and even surface and shall be kept in that condition until accepted by the Engineer.

“34. When the ballasting is completed, the track shall be in perfect line, surface and gauge, and shall be maintained by the contractor until it is accepted by the Company for operation. This contemplates a second adjustment of the track to line and grade, after it has settled under traffic. The line will not be accepted until its is fully completed.”

The evidence tended to show that defendant in April 1927 filed its log tariff with the Interstate Commerce Commission; that thereafter plaintiff hauled some logs of the Clearwater Timber Company under direction of the defendant's [265] engineer; that defendant did take possession of the road from Orofino to Jaype Siding on July 16, 1927, and did take possession of that portion of the road between Jaype Siding and the east switch of Summit on October 12, 1927, and did take possession of all of the road October 25, 1927, and over all of said portions of the road so taken did conduct the commercial haul and excluded plaintiff therefrom. It was admitted at the trial that the

total number of car miles of commercial freight at \$1.00 per car mile transported by defendant over the line under construction from July 17, 1927, to October 25, 1927, amounted to \$304,301.08, and the amount of commercial freight at \$1.00 per car mile transported by defendant over the line under construction between July 17, 1927, and December 31, 1927, amounted to \$443,184.70. Qualified witnesses for plaintiff testified as to the probable cost to the contractor (plaintiff) of conducting this commercial business for the periods mentioned. The estimates ranged from a minimum figure of \$490.10 per day to a figure of \$595.90 per day, and the witness who furnished the higher figure made a further allowance of \$20,000 for wrecks, maintenance of equipment, damage claims and the like, raising his total to \$714.95 per day for the periods above named. The defendant from its records furnished evidence tending to show what the actual cost to defendant of maintaining and operating the railway line in connection with this commercial business between July 17, 1927, and October 25, 1927, amounted to \$104,757.44, and the like cost for the period from July 1, 1927, to December 31, 1927, amounted to \$178,229.84, or a cost averaging slightly more than \$1,060.00 per day for the longer period, and \$1,037.00 per day for the [266] shorter period. The defendant further produced testimony tending to show that such cost was a reasonable cost for a railroad operating under the conditions and restrictions imposed upon an interstate railroad subject to jurisdiction of the Interstate Commercial

Commission. The testimony furnished by the plaintiff was as to conducting the commercial haul with the equipment used by and under the conditions under which the plaintiff would work. The auditor found that the sum of \$72,209.95 would fairly represent the cost to the contractor of handling the commercial business which was in fact hauled by the railway company over the new line for the period beginning July 17, 1927, and ending October 25, 1927, and that the sum of \$120,111.60 would fairly represent the cost to the plaintiff of handling the commercial hauling which was in fact hauled by the railway company over the newly constructed line for the period from July 17, 1927, to December 31, 1927. [267]

There was further evidence tending to prove that on October 25, 1927, defendant took charge of the entire line and excluded plaintiff therefrom, and defendant proceeded to complete the work on said line of railroad through its construction department, and did not deliver said road to the operating department of defendant until December 31, 1927.

Before the case was submitted, plaintiff requested the court to make the following finding, being request number XI, which request the court refused:

“Defendant did not settle upon a definite program promptly as should have been done in order to finish the work in the time for building of the bridges required under weather conditions contemplated. During the early stages of the work the use of local timber was con-

templated. In January 1926 defendant definitely determined to use timber shipped from the Pacific Coast on a major portion of the bridges, and so notified plaintiff; also in June 1926 defendant determined to use a type of construction not mentioned in the representations upon which plaintiff bid, consisting of bents located on mud blocks set in level excavation under water. The type adopted is not usual or customary in bridge construction, is much more expensive to erect *in element* weather, and very much more expensive to erect under the conditions that prevailed when the majority of the bridges were erected by plaintiff. In addition, the number of bents was increased materially over the plan submitted to plaintiff, thereby increasing the amount of underwater work. Bridge plans were delivered to the contractor piecemeal and late, the last not reaching the contractor until late in the summer of 1926."

To the refusal to make said finding, plaintiff reserved the following exception:

"Plaintiff excepts to the refusal of the court to make requested finding number XI or something equivalent thereto."

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following finding, being request number XII, which request the court refused: [268]

"The division of work among subcontractors, which was approved by defendant's chief engi-

neer, contemplated that grading on the first 15 miles out of Orofino would be finished July 15, 1926, all of the grading in the canyon by September 1, 1926, and grading on the upper portion of the line near Headquarters by October 1, 1926. Under this plan all difficult work, including substructure of bridges, would have been completed by October 1, 1926, and the superstructure could have been erected above water. Plaintiff was sufficiently financed and equipped to and would have performed the work in the time fixed but for delays caused by changes in character and quantity of work by defendant. These changes so delayed plaintiff's work that many of the bridges had to be erected in the second winter under terrible hardship and at greatly increased cost. Also many channel changes and heavy grading had to be performed in the second winter at increased cost."

To the refusal to make said finding, plaintiff reserved the following exception:

"Plaintiff excepts to the refusal of the court to make plaintiff's requested finding number XII or something equivalent thereto as essential to understanding the delay in completing work caused by the conduct of defendant and the hardships imposed upon plaintiff thereby."

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following finding,

being request number XVII, which request the court refused:

“Bridges were numbered beginning at No. 1, near Orofino, and working up toward Headquarters. Winter work and difficulties caused by piecemeal construction involved the bridges after bridge No. 8. Defendant required plaintiff to set the mud blocks in place under water during the summer of 1926, with holes bored in the parts under water into which dowel pins were to be fitted when the bents were ready for erection. Changes in plans and amount of work so delayed the grading that the erection of bridges was compelled to be performed in the second winter. The winter of 1926-1927 was severe along Orofino Creek; heavy rain, snow-fall and icy conditions prevailed. The water in the creek was high and the work of fitting dowel pins into holes was performed under these conditions. The cost and value of bridge work because of delay caused by defendant was increased at least \$84,004.00.” [269]

To the refusal to make said finding, plaintiff reserved the following exception:

“Plaintiff excepts to the court’s refusal to make plaintiff’s requested finding XVII, plaintiff contending that the evidence supports and justifies such finding and that it is necessary to an understanding of the conduct of defendant causing an extension of time for completion of the contract.”

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following finding, being request number XVIII, which request the court refused:

“Changes in plans by defendant delayed and broke up the track laying, causing the laying of only short stretches of track at a time, some of it on soft unfinished grades, and then waiting for embankment on changed and difficult portions of the road. The extra cost and value of track laying caused by these changes was \$34,613.00 in excess of what the cost and value would have otherwise been.”

To the refusal to make said finding, plaintiff reserved the following exception:

“Plaintiff excepts to the refusal of the court to make plaintiff’s requested finding XVIII, plaintiff contending that the evidence supports and justifies said finding and that it is necessary to an understanding of the delay caused by defendant extending the time within which plaintiff should complete its entire contract.”

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following finding, being request number XIX, which request the court refused:

“The increase in the amount of work over that represented to plaintiff was gradual. Plaintiff was not advised of the proposed changes until they were reached in the work and had no

opportunity to plan therefor. Plaintiff moved more than the amount of yardage represented in the invitation to it to bid and shown on the profile on schedule time and before October 1, 1927, and was adequately financed and equipped and had proper organization and plans for the work represented when plaintiff bid, and could and would have completed the represented work on schedule time." [270]

To the refusal to make said finding, plaintiff reserved the following exception:

"Plaintiff excepts to the refusal of the court to make plaintiff's requested finding XIX, plaintiff contending that the evidence supports and justifies said finding, that it is in accord with the facts and that it is necessary to an understanding of the delay in completion of the contract caused by defendant's conduct and the extension of time of performance thereby."

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following finding, being request number XXII, which request the court refused:

"The changes in plans and character of work and overrun in yardage prevented plaintiff finishing the contract within the stipulated time. Under direction of defendant plaintiff continued the contract beyond the stipulated time and defendant accepted the work."

To the refusal to make said finding, plaintiff reserved the following exception:

“Plaintiff excepts to the refusal of the court to find as requested in plaintiff’s requested finding number XXII and to the modification of said finding.”

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following conclusion of law, being request number II, which hequest the court refused:

“Plaintiff was adequately financed to perform the job represented and had plans and organization to complete the work within the time fixed by the contract and would have so completed the job but completion was delayed by conduct of defendant and time to finish the work extended accordingly.”

To the refusal to make said conclusion of law, plaintiff reserved the following exception:

“Plaintiff excepts to the refusal of the court to make plaintiff’s requested conclusion of law number II.”

which exception was duly allowed by the court. [271]

Plaintiff further in like manner and time requested the court to make the following conclusion of law, being request number VI, which request the court refused:

“Defendant did not have the right to take over portions or any of the road before it was finished and itself do the finishing work on the

part taken over under either the "stop work" clause or the "change of work" clause of the contract, and its action in this respect breached the contract. Plaintiff is entitled to recover the net profits of the commercial haul of which it was deprived, as found by the court."

To the refusal to make said conclusion of law, plaintiff reserved the following exception:

"Plaintiff excepts to the refusal of the court to make plaintiff's requested conclusion of law number VI in so far as the court in the conclusion of law made by the court limited plaintiff's recovery for the commercial haul to the sum of \$125,000 net and limited the right to conduct the commercial haul to September 1, 1927."

which exception was duly allowed by the court.

Plaintiff further in like manner and time requested the court to make the following conclusion of law, being request number X, which request the court refused:

"A final estimate was not certified by the chief engineer as provided in the contract, nor payment made to plaintiff. Such final estimate should have been submitted and payment made by February 1, 1928. Plaintiff is entitled to recover interest on all sums due at the rate of six per cent per annum from February 1, 1928."

To the refusal to make said conclusion of law, plaintiff reserved the following exception:

“Plaintiff excepts to the refusal of the court to make plaintiff’s requested conclusion of law number X.”

which exception was duly allowed by the court.

The court made the following finding of fact, being number IX: [272]

“The contract between the parties contemplated and required the construction of bridges such as those actually built by plaintiff and its subcontractors in the performance of the work, both with respect to foundations and superstructure. No change was required by defendant in this class of work from what was contemplated when the contract was entered into.”

To the making of said finding of fact, plaintiff reserved the following exception:

“Plaintiff excepts to finding number IX made by the court in that it fails to take into consideration the fact that the plans of work laid out by plaintiff and approved by defendant contemplated heavy grading and bridge work only in the first winter.”

which exception was duly allowed by the court.

The court made the following finding of fact, being number X:

“The additional yardage, the increased number of channel changes, the decreased number of bridges, whether changes from the work contracted for or merely changes from preliminary estimates made before the contract was entered

into, did not make the unit prices of the contract inapplicable and did not affect such prices within the meaning of the provision of the contract authorizing changes in the work."

To the making of said finding of fact, plaintiff reserved the following exception:

"Plaintiff excepts to finding number X made by the court because it does not properly represent the fact of the original representations when bids were made and the departure therefrom in actual work."

which exception was duly allowed by the court.

The court made the following finding of fact, being number XVI:

"By permission of the defendant, the plaintiff continued the contract beyond the stipulated time and the defendant accepted the work, but the defendant did not permit the plaintiff to conduct any commercial hauling over the portions of the road taken over by the defendant."

To the making of said finding of fact, plaintiff reserved the following exception: [273]

"Plaintiff excepts to finding number XVI made by the court in so far as it constitutes a modification of plaintiff's requested finding number XXII and in so far as it holds that the time for completion of the entire contract was not extended by defendant's conduct; defendant contends that denying plaintiff the right to conduct the commercial hauling was just as

wrongful after September 1, 1927, while plaintiff was continuing with the contract as it was prior to that date.”

which exception was duly allowed by the court.

The court made the following finding of fact, being number XVIII:

“It was admitted at the trial that the total number of car miles of commercial freight at \$1.00 per car mile transported by defendant over the line under construction July 17, 1927, to October 25, 1927, amounted to \$304,301.08, and July 17, 1927, to December 31, 1927, amounted to \$443,184.70. The auditor found the fair cost of such transportation by plaintiff would have been \$72,209.95 for the shorter period, and \$120,111.60 for the longer period. The court approves these findings, but the court finds that the plaintiff was entitled to conduct the commercial haul only until September 1, 1927, when the contract was to have been finished; that the plaintiff was prepared to conduct such haul, and was damaged in the sum of \$125,000 by being deprived thereof up to September 1, 1927; that the right to conduct said commercial haul terminated on that date. The court further finds that plaintiff’s pleadings do not present the issue of defendant’s conduct extending the time to complete the contract beyond September 1, 1927.”

To the making of said finding of fact, plaintiff reserved the following exceptions:

“Plaintiff excepts to that part of finding number XVIII made by the court in which the court refuses to permit recovery for the so-called commercial haul up to and including October 25, 1927, and up to and including December 31, 1927, and in which the court finds plaintiff’s right to conduct the commercial haul terminated September 1, 1927, and in which the court finds the question of extension of time for completion of the contract by defendant’s conduct was not made an issue by plaintiff’s pleadings, plaintiff contending that the issue of delay in the completion of the contract by defendant’s conduct and extension of time for completion thereby is tendered in plaintiff’s complaint.”

which exception was duly allowed by the court;
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“Plaintiff excepts to that portion of finding XVIII made by the court in so far as it holds that only \$125,000 are due plaintiff on account of the commercial haul.”

which exception was duly allowed by the court;

“Plaintiff excepts to the failure and refusal of the court to allow interest from February 1, 1928, on the sum of \$125,000 allowed on account of the commercial haul in finding number XVIII, plaintiff contending that the contract required all amounts earned by plaintiff to be paid by February 1, 1928, and that this sum became due at that date and interest at the rate of six (6) per cent per annum thereon should

be allowed from that date and any less allowance would deny plaintiff fair compensation or adequate relief."

which exception was duly allowed by the court.

The court made the following conclusion of law, being number II:

"Defendant breached its contract by taking over an uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct the hauling of commercial freight over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book accounting, the sum of \$ 8,865.75

with interest thereon at six per cent per annum from February 13, 1930

On the commercial haul, the sum of 125,000.00
without interest prior to judgment

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers, \$ 26,843.47

For hauling piling, 4,693.29

For hauling bridge metals,	1,249.69
without interest prior to judgment." [275]	

To the making of said conclusion of law, plaintiff reserved the following exception:

"Plaintiff excepts to conclusion of law number II made by the court in so far as said conclusion limits the plaintiff's recovery on the commercial haul to \$125,000 and in so far as said conclusion denies the allowance of interest at six (6) per cent per annum on the amount allowed from February 1, 1928, and in so far as said conclusion denies interest at six (6) per cent per annum on the amount found to be due for hauling materials, said interest to run from February 1, 1928."

which exception was duly allowed by the court.

The contract between the parties to this litigation was at trial admitted to be in form and substance as set forth in Exhibit "A" of defendant's answer. Said contract fixes the unit prices to be paid for the work therein provided. Among those unit prices are the following, as set forth in the contract:

Hauling piles furnished by the company	
per lineal foot mile	\$.02
Hauling timber furnished by the company	
per thousand feet b. m. mile	.85
Hauling metal fastenings per ton mile	.65

There was evidence introduced tending to show (and there was no controversy on this point) that the plaintiff during the performance of its contract hauled piling furnished by the defendant (company) for which, at the rate of 2¢ per lineal foot mile, the plaintiff should have been paid \$5,353.78, but that defendant paid of said amount only \$660.49; that the plaintiff hauled timber furnished by the defendant (company), for which, at the rate of 85¢ per thousand feet b. m. mile, plaintiff should have been paid \$47,253.99, but that defendant paid of said amount only \$20,410.52; that the plaintiff hauled metal fastenings furnished by the defendant (company), sufficient in quantity, at 65¢ per ton mile, to amount to \$2,563.31, but that defendant paid of said amount only \$1,313.62. [276]

Before said cause was submitted, plaintiff duly requested the court to make the following conclusion of law, being request number X, which request the court refused:

“A final estimate was not certified by the chief engineer as provided in the contract, nor payment made to plaintiff. Such final estimate should have been submitted and payment made by February 1, 1928. Plaintiff is entitled to recover interest on all sums due at the rate of six per cent per annum from February 1, 1928.”

To the refusal to make said conclusion of law, plaintiff reserved the following exception:

“Plaintiff excepts to the refusal of the court to make plaintiff’s requested conclusion of law number X.”

which exception was duly allowed by the court.

The court made the following finding of fact, being number XIX:

“The contract fixed prices for hauling certain materials, as follows:

Hauling piles furnished by the company per lineal foot mile, \$.02

Hauling timber furnished by the company per thousand feet b. m. mile, .85
[277]

Hauling metal fastenings per ton mile, .65

“These stipulations of the contract were breached by the defendant, who paid for hauling said materials at the rate specified in the contract for commercial hauling and refused to pay at the rate specified in the contract for hauling said materials. This material haul is not commercial haul and was intended to be compensated at the specified prices for material haul. The plaintiff hauled timber furnished by the defendant for which the plaintiff should have been paid \$47,253.99. The defendant has paid but \$20,410.52 of this amount, leaving unpaid and due to plaintiff on this item \$26,843.47. The plaintiff hauled piling furnished by the defendant for which the plaintiff should have been paid \$5,353.78. The defendant has paid but \$660.49 of said amount, leaving unpaid and due to the plaintiff on this item

\$4,693.29. The plaintiff hauled metal fastenings (bridge iron and galvanized iron) furnished by the defendant for which plaintiff should have been paid \$2,563.31. The defendant has paid but \$1,313.62 of this amount, leaving unpaid and due the plaintiff on this item \$1,249.69."

To the making of said finding of fact, plaintiff reserved the following exception:

"Plaintiff excepts to the failure and refusal of the court to allow interest from February 1, 1928, at the rate of six (6) per cent per annum on the sums found to be due and unpaid for hauling bridge materials in finding number XIX made by the court, plaintiff contending that this sum was at all times definite and known, that plaintiff was entitled to either the amount demanded or nothing, that the only question involved was a question of the right of the defendant to refuse to pay the contract price and that under the contract this money was due and payable February 1, 1928, and anything less than interest at the legal rate would deny plaintiff fair compensation."

which exception was duly allowed by the court.

The court made the following conclusion of law, being number II:

"Defendant breached its contract by taking over an uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct the hauling of commercial freight

over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of [278] said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book accounting, the sum of	\$ 8,865.75
with interest thereon at six per cent per annum from February 13, 1930	

On the commercial haul, the sum of	125,000.00
without interest prior to judg- ment	

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers,	\$ 26,843.47
For hauling piling,	4,693.29
For hauling bridge metals,	1,249.69
without interest prior to judg- ment."	

To the taking of said conclusion of law, plaintiff reserved the following exception:

"Plaintiff excepts to conclusion of law number II made by the court in so far as said conclusion limits the plaintiff's recovery on the commercial haul to \$125,000 and in so far as

said conclusion denies the allowance of interest at six (6) per cent per annum on the amount allowed from February 1, 1928, and in so far as said conclusion denies interest at six (6) per cent per annum on the amount found to be due for hauling materials, said interest to run from February 1, 1928."

which exception was duly allowed by the court.

On February 25, 1937, findings of fact and conclusions of law were made by the court, and on the same date the court entered judgment for plaintiff.

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Prior to making and filing its said findings of fact and entering its said judgment the court rendered an oral opinion as follows:

"The Court: I will render the opinion in the case of *Twohy Brothers Company v. Northern Pacific Railway Company*.

"I will say at the outset, gentlemen, that, although I have taken considerable time for investigation of this case, my opinion consists largely at this time of statement of conclusions without any careful statement of the underlying law involved. I will make no statement of facts, because the facts are extremely well outlined in the report of *Evrett A. Johnson*, the Auditor, and in most instances the Court agrees with him in his conclusions of fact, after examination of the record. The places where I do not agree will be noted in the opinion.

“There is one matter which was settled by agreement between the parties before submission to the Court. This was the amount due upon the final estimate. This was fixed at \$8,865.75, which will be allowed.

“This case has been pending for many years; it was tried before an auditor under the supervision of the late Judge Bean. After the report was submitted it was transferred to the present Judge for further proceedings. It was once set for dismissal under rule of court requiring some action to be taken in any cause within a year. The dismissal was not granted because of the showing of willingness to proceed. Thereafter local counsel were changed and an amended complaint tendered. On account of the history of the case the Court imposed upon the plaintiff the requirement that it pay one-half of the fees of the hearing before the Auditor before filing an amended complaint. These terms were not accepted. The statute of limitations against the action had run at that time, whether it was upon contract or for damages for breach of contract or on quantum meruit. But if the ‘operative facts’ be regarded instead of the technical ‘cause of action’ it would still work an injustice to defendant to allow plaintiff to shift its ground after the ‘statute of repose’ had expired.

“The Auditor finds, as far as the construction claims in this case are concerned, that the whole pleading is based upon the theory that

the action was for damages for breach of contract. The Court agrees with this interpretation of the complaint itself. The Court further construes [280] the contract as an agreement for the building of a line of railroad between two fixed terminals. There is no suggestion in the contract itself nor in the other evidence before the Court that there was any plan upon the part of the Railroad Company or of the Contractor that the line should be confined to the limits of the Chamberlain survey. Insofar as evidence was admissible upon the subject at all the Court finds that there was no misrepresentation upon the part of the Railroad Company as to this proposition. The Contractor knew of the conditions and had almost as much opportunity to investigate the fitting of the line to the country through which it was laid as did the Railroad Company. Chamberlain was not an employe of the Railroad Company at the time that the line was surveyed by him and it was not responsible for his judgment. Proceeding upon this basis the Court finds no theory upon which there could be based an award for breach of contract because the defendant misrepresented the situation of the railroad line. According to the contract the plaintiff was to be paid for its labor and material based upon the work done. To this stipulation the plaintiff is bound as part of its agreement.

“There was a great deal of testimony taken as to changes of the line. As I read the con-

tract, this was all taken care of by exact stipulation of the agreement and that, therefore, the plaintiff can not recover on the theory that the entire basis of the contract was changed by delay caused by the Railroad Company during construction or caused by the changes of line, shifting the work into a more difficult period of the year. The Contractor as well as the Railroad Company knew that this line was to be built through Orofino Canyon and both parties were required to take notice of the fact that sub-arctic conditions, practically, prevail in that territory, at least in some winters. This contract covered a period of winter time as well as summer time, and, therefore, working under normal conditions, the Contractor must have expected to do work in the winter time, and, having stipulated that it was to build the line where directed by the Railroad Company in Orofino Canyon and to accept for the work done the prices stipulated in the contract, it is bound thereby.

“A great deal of testimony was offered as to how much labor and material would have been required if the line had been built in exact accordance with the Chamberlain survey. This testimony will be rejected, because it is entirely immaterial. There was no misrepresentation in the negotiations or the contract itself. The Railroad Company reserved full power to build the line as it desired and as the circumstances dictated. Plaintiff was a free agent and was not

required to bid upon or enter into such a contract as it signed. [281]

“This reduces the construction claims to one simple question of breach of contract. The matter of the allowance of additional compensation by the Engineer under the ‘substantial justice’ clause is one which was committed to the sole judgment of the Engineer if exercised impartially. Plaintiff did not properly call this stipulation into play. The claim should have been filed upon this language and supported by reference to the cost of the work to the contractor. Some foundation would then have been laid for a determination by the Court if the Engineer had arbitrarily refused to make any award or had made an insufficient award.

“There certainly is before this Court no thorough cost accounting upon the work as a whole from which the Court could judge whether the refusal of an allowance or an insufficient allowance by the Chief Engineer under the ‘substantial justice’ clause would constitute a breach of contract. But instead of standing on the strict letter of the contract plaintiff depended upon negotiations for settlement. In these negotiations the Engineer offered to pay \$80,000, but the evidence was convincing that this proposal was in settlement of all claims and is based upon negotiations not carried on under the terms of the contract. It can not be transmuted into a declaration of a ‘substantial justice’ award. There is considerable doubt that the

Engineer had the data before him upon which he could base such award. It is true that after the signing of the supplemental contract the Railroad Company had an auditor with the Twohy Brothers. Whether there was a complete cost accounting or not the record is in doubt. It is only upon such a basis and upon profit and loss to the Contractor upon the project as a whole that 'substantial justice' could have been worked out. Thus there was no breach of contract in the failure of the Engineer to make such an award without a demand therefor.

"Since no award was made the Court can not impeach the Engineer's findings for bad faith, nor has the Court any evidence upon which an exact finding in lieu thereof based upon the cost and profit and loss to the Contractor could be made. Furthermore, these features can not be supplied by estimates of persons in the employ of the Contractor. These are only too subject to emotional and partisan error. Especially is this true where the witness, perhaps unconsciously, may be justifying his original cost figures upon which the bid was made.

"Upon no theory, therefore, can any claim upon the construction be allowed. This opinion is reinforced by the attitude of the officers of the Contractor during construction, and through [282] all the time of the taking of the testimony. The legal sub-strata attempted to be

used in shoring up these claims is an ingenious device which was struck upon after the testimony was taken and which can not supply the facts or change the original contract.

“The matter of classification of conglomerate is urged as a special feature. The Engineer of defendant allowed additional compensation or a special compensation for removing this material. A case might be made for a higher or a lower price, but upon the whole this allowance seems to have been made in good faith and to be reasonable.

“The claims for timber haul are upon an entirely different basis. These are founded upon the terms of the contract itself. The defendant definitely agreed to allow the plaintiff to haul by its own work train all commercial business for one dollar per car mile. Defendant drew the contract, and all of the implications are in favor of plaintiff. No contrary inference from the plain language of the stipulation can be drawn from the fact that it is included in the portion of the specifications referring to finishing. The defendant had not expected to haul timber upon the road at any time prior to June 1st, which was the date when the construction was all to have been completed, but the finishing was still to be done. It was therefore logical in chronological sequence to place these provisions concerning the haul by the trains of the Contractor with the stipulations as to finishing the line. The hauls could not be made until at

least a part of the line was completed. The stipulation itself is unambiguous and the Court therefore rejects as incompetent testimony of Twohy and Boss as to how the bid was made up.

“The court also rejects the argument and what evidence there is that the Railroad Company would not have hauled any logs if it had not intended the contract to be construed according to its present contention. It was not what the company intended but what the parties agreed to that binds the Court. The stipulation is perfectly plain and intelligible as it stands. The Chief Engineer attempted to justify the taking over of this portion of the line by the ‘stop work’ clause in the contract. If the railroad had abandoned the line for any reason sufficient to itself, or had stopped work upon any portion of the line for a period of time, or had commenced construction upon one route and subsequently had the work stopped there and allowed the plaintiff to construct the line between the same terminals over a different route, the Contractor would have been bound by the ‘stop work’ order and could not have recovered damages for any anticipated profits because of its issuance. [283] The Railroad Company has argued, and both the Auditor and the Court have accepted, the fact that the contract provided for the construction of a complete line of railroad between two terminals. If the defendant had stopped the work in good faith the plaintiff would have had no right of action ex-

cept for the work done, but this clause can not be used by the defendant, where the line was completed as contemplated, as an excuse for taking over part of the line before the date set for the completion of the whole and for robbing the plaintiff of a chance to do this specified incidental work at contract rates. It is suggested that a supplemental contract was entered and thereby the Contractor's rights cut off, but the subject is not mentioned in the supplemental agreement. Even if it be assumed that the plaintiff on account of its financial necessity might have yielded on this point, still it did not have the specific matter proposed to it in this light and no practical stipulation of any kind covered the point, except the one in the original contract. It is further contended that Mr. Twohy waived the fulfillment of this clause by defendant in his letter directed to Mr. Stevens, but it is elementary law that the stipulation of a contract can only be removed by supplemental agreement. Otherwise there is a single question: Was the particular stipulation fulfilled or was it broken? If observed it would be fulfilled and thereby erased from the contract. If broken, the promisor would be liable in damages which could not be waived. Performance of the conditions of the contract may be waived. Performance of the provisions of an agreement could not be. An estoppel is not pleaded, and in any event would not be a defense, since the railroad suffered no damage

and did not rely upon the statements of Mr. Twohy to its injury.

“The Auditor suggests that there are further questions,—whether this matter is one which could have been submitted to the Chief Engineer for determination; second, whether the letter from Mr. Twohy constituted a submission of this controversy to the Engineer and the usual formalities of notice and hearing waived. To this may be added the question whether the Chief Engineer acted or presumed to act under the arbitration clause, and, further, whether his attitude was impartial or was so arbitrary as to amount to constructive fraud. All of these questions must be determined in favor of the plaintiff: First, there is no binding authority that requires this Court to decide that in this type of a contract an employee of one of the parties can by stipulation be allowed to determine what both parties meant by the terms of the agreement. Whatever may be the rule under other types of arbitration, this Court determines that the interpretation of the law governing the construction of the clause of the contract can not be so submitted.

[284]

“Mr. Twohy in his letter to the Chief Engineer in answer to the suggestion of that official that the latter had the power of construction and this power was arbitrary agreed under the duress of the existing situation, but he certainly did not say or apparently intend

that this should be taken as a submission of the specific question without further notice or hearing. Mr. Stevens' own attitude was from the inception arbitrary in the extreme in the matter. He was acting avowedly in the interest of his employer, the Railroad Company. He did not act or assume to be acting under the arbitration clause. He fortified himself by an opinion from the attorneys of the company before dealing with the question. He used his assumed power under the agreement as a threat to compel compliance. Under those circumstances he is far from being the impartial arbitrator required by the law. If there had been a determination by him after submission or hearing the Court would have set such decision aside for constructive fraud based upon his attitude.

"The question remains as to how much should be assessed for damages for breach of this clause of the contract. The contract ended by its terms September 1st, 1927, but the road was to have been turned over to the operating department of the Railroad Company by that date. The Contractor breached its obligation to do so. However, the delays and extra expense caused by the Railroad Company might well have been used as a defense for such a claim by the defendant. It, however, does not even raise the point. On the other hand, the plaintiff can not rely upon its own breach or the sufferance of the defendant in permitting it to complete the work by remaining until

October 25th as extending to that time the profitable log haul stipulation in the agreement, where the hauling of the logs had already been taken over by the Railroad Company. But, although figures were presented in detail for other periods, there is no accounting as to the number of logs hauled by the Railroad Company between June 1st and September 1st. The Court, however, must arrive at some conclusion as to the logs, and therefore assesses the damages for breach of this clause of the contract at \$125,000. If the parties agree, however, further proof may be submitted upon this issue to find the damage more accurately.

“The claims for hauling materials can be considered together. As to all these disputed items the price was fixed under the language of the document for ‘hauling’ thereof. The defendant claims so far as haul by rail is concerned that the moving of these materials took place under the clause providing for the handling of material in empty cars used in the service of the Contractor. There is another clause providing that the maximum team haul of materials should not exceed four miles except [285] on written order of the Engineer. This latter stipulation effects an ambiguity upon the word ‘hauling’, so that the Court will permit the testimony as to the preliminary negotiations. In two other clauses, relating to furnishing materials and placing concrete, where the words ‘team haul’ were used the

Chief Engineer eliminated these words during the negotiations and substituted therefor the word 'hauling'. He thereupon added a new item to the Contractor's bid of 'haul of concrete aggregate', which would have to be done by rail. It is true that the items relating to furnishing of materials and placing concrete in bridge pedestals and piers was reduced materially. It seems obvious that the word 'hauling' as used in all phases of the contract was thus intended to mean haul by rail as well as by other means.

"The questions as to whether there was submission for arbitration, whether a law question could be so submitted, whether the Engineer acted under this submission, or whether any decision by the Engineer could stand considering this attitude in these particular claims, have been adequately discussed and are decided in favor of the plaintiff.

"The Court, therefore, awards in damages for breach of the stipulation for hauling the timber \$26,843.47; for breach of the stipulation as to hauling piling, \$4,693.29; for breach of the stipulation for hauling metal fasteners, \$1,249.69.

"The Court, as it stated at the outset, considers this an action on the contract for damages and for breach thereof. It is not an action for amounts due under a written contract. If this were true a great many of the questions involved in the complaint could not have been

tried or considered. The Court therefore feels that under the Oregon statute it is not bound to allow interest from the date of final estimate but rather is required to allow interest only from the date of entry of the judgment in damages.

“Findings and judgment will enter accordingly.”

The United States District Court for the District of Oregon has standing rules 41 and 42, as follows:

“When an exception is taken, as provided in Rule 40, within ten days after judgment the party taking the same must prepare, in due form, a bill of exceptions, and deliver it to the clerk, for the judge, and serve a copy thereof on the attorney of the adverse party, who may, within five days thereafter, in like manner deliver and serve amendments thereto, and within five days thereafter the [286] party taking the exception may serve a notice upon the attorney of the adverse party, to the effect that he objects to the amendments, and will, at a time not less than three nor more than five days thereafter, apply to the judge at his chambers to settle and sign the bill of exceptions.

“If a bill of exceptions is not delivered and served in due time, the exceptions will be deemed abandoned; and if an amendment thereto is not delivered and served in due time, the bill of exceptions will be deemed assented to; and if such an amendment is delivered

and served and no notice of objection thereto is thereafter duly served by the party taking the exceptions, the same will be deemed assented to by said party.

“A proposed bill of exceptions, and the amendments thereto, if any, are to be considered and submitted to the judge for examination and allowance, without any further notice or action by either party, whenever, according to Rule 41, such bill, or bill and amendment, is to be taken as assented to by the adverse party; and when the same is found or made to conform to the facts it will be allowed and signed by the judge and directed to be filed.”

On February 27, 1937, the following order was entered by the above entitled court:

“In the District Court of the United States
For the District of Oregon

No. L-10532

TWOHY BROTHERS COMPANY, a corporation,

Plaintiff,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Defendant.

ORDER EXTENDING TIME FOR BILL
OF EXCEPTIONS AND EXTENDING
TERM OF COURT

Upon application of defendant,

It is Ordered that the time within which

either party hereto may submit a bill of exceptions for allowance, certification and filing is hereby extended to June 1, 1937.

It is further Ordered that the present term of court be and is hereby extended to June 1, 1937, for the purpose of submission, allowance, certification and filing of bill of exceptions in this action, and for the purpose of granting any further extension of time which the Court may order.

Dated February 27, 1937.

JAMES ALGER FEE

District Judge"

[287]

Forasmuch as the above and foregoing matters and things do not fully appear of record, and the above and foregoing bill of exceptions was duly and regularly served on defendant's counsel, and filed with the clerk of this court, within the time duly fixed by this court, during the term in which the judgment in this cause was made and entered, and the court having examined said bill of exceptions and finding the same fair and correct, now, upon due notice to counsel, the same is settled, allowed and approved, this 19th day of May, A. D. 1937, and it is ordered that said bill of exceptions be filed and the same hereby is made a part of the record in this cause.

JAMES ALGER FEE

United States District Judge

[Endorsed]: Filed May 19, 1937. [288]

And to wit, on the 18th day of May, 1937, there was duly filed in said Court, a petition by defendant for appeal, in words and figures as follows, to wit: [289]

[Title of Court and Cause.]

PETITION FOR APPEAL AND FOR ORDER
FIXING AMOUNT OF BOND

Now comes defendant, Northern Pacific Railway Company, a corporation, and feeling itself aggrieved by the final judgment of the Court entered herein on the 25th day of February, 1937, in favor of plaintiff and against defendant, hereby prays that an appeal may be allowed to it from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors filed herewith.

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the cause and that the amount of security may be fixed by the order allowing this appeal, and that a proper transcript of the record of proceedings and papers upon which said judgment was made, truly authenticated, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

L. B. DAPONTE

CHARLES A. HART

CAREY, HART, SPENCER & McCULLOCH

Attorneys for Appellant

[Endorsed]: Filed May 18, 1937. [290]

And afterwards, to wit, on the 18th day of May, 1937, there was duly filed in said Court, by defendant, an assignment of errors, in words and figures as follows, to wit: [291]

[Title of Court and Cause.]

DEFENDANT'S ASSIGNMENTS OF ERROR

Now comes defendant herein and in connection with its petition for an order allowing an appeal in this cause, assigns the following errors which defendant avers occurred on the trial of the cause and upon which defendant relies to reverse the judgment entered herein as appears of record:

(Assignments I to XIV, inclusive, relate to ruling interpreting contract to give plaintiff the right to conduct operations on the railroad to be constructed.)

I.

The District Court erred in ruling that the contract between the parties, dated October 15, 1925, for the construction of the so-called Orofino Branch of defendant's railroad, gave plaintiff the right to retain possession of the newly constructed line and to conduct all commercial operations thereon, until the date fixed by the contract for completion of the work contracted for. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusions of Law Nos. II, III, IV and V, respectively, and for the entry of its [292] Requested Findings of Fact

Nos. XV, XVI and XVII, respectively, and in the making and adoption of Finding of Fact No. XV and Conclusions of Law II and III, respectively, and is erroneous in that the contract, correctly interpreted, required and permitted plaintiff to conduct transportation operations on the railroad, as constructed, only in its work trains as called upon to do so by defendant, as an incident to the construction work, and did not prevent defendant from taking over and making use of any part of its railroad whenever it was deemed ready for such use.

II.

The District Court erred in ruling that the contract between the parties denied defendant the right to take over and use any part of the railroad to be constructed, in advance of the date specified in the contract for completion of construction, whenever defendant deemed such part to be sufficiently completed for use. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusions of Law Nos. II, III, IV and V, respectively, and for the entry of its Requested Findings of Fact Nos. XV, XVI, and XVII, respectively, and in the making and adoption of Finding of Fact No. XV and Conclusions of Law II and III, respectively, and is erroneous in that the contract, correctly interpreted, permitted defendant to use its property as soon as it deemed said property to be ready for use.

III.

The District Court erred in ruling that the contract between the parties did not permit defendant to take possession of and to use any part of the railroad to be constructed, by reason of the provisions of the contract authorizing defendant [293] to stop work or any part thereof or to change the amount of work to be done under the contract. Said ruling was made in the Court's order denying defendant's motion to make and adopt its Requested Conclusions of Law II and III, respectively, and is erroneous in that the contract, correctly interpreted, gave defendant the right to stop any part of the work required of plaintiff; or to change the amount of work to be done by plaintiff under the contract.

IV.

The District Court erred in ruling that plaintiff is entitled to recover damages from defendant for loss of opportunity to conduct transportation operations on said railroad, measured by the volume of business actually done by defendant. Said ruling was made in the Court's order denying defendant's motion to adopt its Requested Conclusion of Law No. IV and in the making and adopting of Finding of Fact No. XVIII and Conclusion of Law No. II, and is erroneous in that defendant was not legally obligated to accept any commercial traffic, and the volume actually handled by defendant cannot be taken as the measure of what would have been accepted for transportation, if plaintiff had

been permitted to remain in possession of the part of the railroad taken over by defendant.

V.

The District Court erred in holding and determining that defendant, in taking over and operating in commercial log haul transportation, between July 17, 1927, and September 1, 1927, the first 29 miles of the railroad constructed under the terms of the contract between the parties, breached its obligations under said contract. Said holding and determination [294] was made in the making and adoption of Finding of Fact Nos. XV and XVIII, respectively, and Conclusion of Law No. II, and in the order denying defendant's motion to make and adopt its Requested Finding of Fact No. XVI and Conclusions of Law Nos. II, III, IV and V, respectively, and is erroneous in that the contract between the parties, correctly interpreted, gave defendant the right to take possession of and use said portion of said railroad, at the time such possession was taken.

VI.

The District Court erred in making and adopting the following "Finding of Fact" in that said Finding misinterpreted the contract between the parties, as specified in the foregoing assignments of error Nos. I, II and V, respectively:

"XV

The contract gave plaintiff the right to conduct commercial hauling while the line was

under construction and was breached by defendant in the following manner:

During the year 1926 defendant planned that the road would be ready to move logs during the summer of the year 1927 and the Clearwater Timber Company cut and banked logs along the railroad right of way to the extent of many million feet of timber. These logs were Idaho white pine, with a stumpage value of \$10 per thousand feet, and would be seriously damaged if not moved before the winter of 1927-1928.

In April, 1927, the defendant filed its log tariff with the Interstate Commerce Commission. Thereafter the plaintiff hauled some logs for the timber company under direction of the defendant's engineer. In June, 1927, the defendant asserted its intention to conduct the log haul. The plaintiff protested, and the defendant thereupon served upon the plaintiff a notice as follows:

‘NORTHERN PACIFIC RAILWAY
COMPANY

Engineering Department

St. Paul, Minn. July 8, 1927.

[295]

Twohy Brothers Company,
General Contractors,
Orofino, Idaho.

Gentlemen:

You are hereby notified to stop work covered by your contract between Orofino

and the northerly end of Jaype Siding on July 16, 1927.

In accordance with my verbal understanding with Mr. James Twohy, you will proceed with the completion of the contract work north of Jaype Siding, confining your operations to that portion of the line on and after July 16th. The Railway Company will deliver to you at Jaype, without cost to your Company, rail and other materials required for completion of your contract north of that point.

Yours truly,

H. E. Stevens'

The plaintiff protested. The defendant did not in fact stop work, but itself took over and finished work on that portion of the road covered by said notice. The work required of the plaintiff under its contract on that portion of the road was not finished when the notice to stop work was served. On October 7, 1927, the defendant served on the plaintiff the following notice:

**'NORTHERN PACIFIC RAILWAY
COMPANY**

Orofino, Idaho,
October 7, 1927

Twohy Bros. Co.,
Orofino, Idaho.

Gentlemen:

I am authorized by the Chief Engineer to notify you to stop all work covered by

your contract between the west switch of Jaype siding and the east switch of Summit siding on October 12th.

In accordance with my conversation with Mr. James Twohy and your Mr. Horan you will proceed with the completion of the contract work west of the east headblock of Summit siding, confining your operations to that portion of the line after October 12th. The Railway Company will deliver to you at Summit, without cost to your company, rail and [296] other material required for the completion of your contract.

Yours truly,
H. M. Tremaine,
Assistant Engineer.'

This was answered by Twohy Brothers as follows:

'Orofino, Idaho,
October 20th, 1927.

Mr. H. M. Tremaine, Asst. Engr.,
Northern Pacific Railway Co.,
Orofino, Idaho.

Dear Sir:

We have your letter of October 7th and in accordance with the peremptory order therein contained are stopping all work between the west switch of Jaype siding and the east switch of Summit siding.

However, we adhere to the position taken by us in a letter addressed to Mr. Stevens, the chief engineer, dated July 14th, 1927, and we do not admit the validity of your construction of our contract, but on the contrary think that our rights thereunder are being infringed.

Yours truly,

TWOHY BROTHERS COMPANY,

By

The defendant did take possession of that portion of the road mentioned in the defendant's said letter of October 7 on October 12 and exclude plaintiff therefrom. On October 25, 1927, the last portion of the road under construction was taken by the defendant before completion but without serving upon the plaintiff any notice to stop work, and the plaintiff was excluded therefrom. At the time the defendant so took possession of each portion of the road in this finding mentioned, the work required of the plaintiff under its contract on such portion was not finished and the plaintiff was progressing satisfactorily with its contract and the defendant did not in good faith intend to stop work but did intend to continue the work itself and took possession of the road for the purpose of conducting the log haul and depriving the plaintiff thereof.

The log haul was commercial business. To do [297] it was required of the plaintiff under its

contract, and the plaintiff was entitled to perform same. There was no change in plans or work when the portions of the road were so taken over by the defendant and work was not stopped. The road was turned over to the Operating Department on December 31, 1927.”

VII.

The District Court erred in adopting the following Conclusions of Law in that said Conclusions misinterpreted the contract between the parties and the rights of the parties thereunder, as specified in the foregoing Assignments of Error Nos. I, II, III, IV and V, respectively:

“II

Defendant breached its contract by taking over an uncompleted portion of the railroad July 17, 1927, and refusing to permit plaintiff to conduct the hauling of commercial freight over said railroad thereafter, and breached its contract by refusing to pay to plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, and breached its contract in failing to render a final estimate at the conclusion of work. Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

Upon the final estimate or book
accounting, the sum of \$ 8,865.75
with interest thereon at six
per cent per annum from
February 13, 1930

On the commercial haul, the
sum of 125,000.00
without interest prior to
judgment.

For hauling materials, plaintiff is entitled to
recovery as follows:

For hauling timbers,	\$26,843.47
For hauling piling,	4,693.29
For hauling bridge metals,	1,249.69
without interest prior to judgment."	[298]

"III

For all of said recoveries, the plaintiff is entitled to have judgment against the defendant, as also for its costs and disbursements herein incurred."

VIII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"XV

Under the terms of the construction contract, plaintiff was required to complete ballasting

and surfacing work upon the railroad track until a smooth and even surface acceptable to defendant was secured. Defendant did not require plaintiff to do all of this work with respect to the first twenty-nine miles of railroad, between Orofino and Jaype, but without reducing plaintiff's compensation for tracklaying, ballasting, and surfacing in any way, defendant accepted this portion of the railroad without full performance by plaintiff. This action was taken by defendant on July 8, 1927, and plaintiff was notified to stop all work upon this part of the railroad. Defendant thereafter engaged in common carrier log transportation upon the part of railroad thus accepted and taken over from plaintiff."

IX.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"XVI

Defendant made no commitment of any kind to [299] anyone with respect to the log traffic to be handled over that part of its railroad so taken over on July 8, 1927, and was not obligated at that time to engage in log transportation prior to the final completion of its railroad."

X.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact in that said Finding was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

“XVII

Plaintiff, during the negotiations leading up to the execution of the supplemental contract of April 26, 1927 (under which defendant thereafter financed plaintiff's operations), or thereafter or at any time until June 17, 1927, made no claim of any right to retain possession of defendant's railroad, or any part thereof, beyond the time when defendant was willing to accept and take over such railroad, or any part thereof, for the purpose of conducting log transportation thereon. But at all times prior to June 17, 1927, plaintiff acquiesced in construing its contract with defendant as one for the construction of defendant's railroad, without any right to conduct log transportation upon the newly laid track other than to haul in its work trains any cars of commercial freight which defendant might desire to have hauled at the stated compensation of \$1.00 per car mile therefor.”

XI.

The District Court erred in denying defendant's motion, made before final submission of the cause,

for an order making and adopting the following Requested Conclusion of Law in that the contract between the parties, correctly interpreted, required such Conclusion:

“II

Plaintiff was not entitled, under its contract with defendant, to retain possession of any [300] part of defendant's branch line of railroad, after tracklaying and before final completion, for the purpose of conducting transportation operations thereon; defendant had the right to accept said railroad, or any part thereof, without demanding complete ballasting and surfacing thereof.”

XII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

“III

Defendant, in taking over from plaintiff the first twenty-nine miles of its railroad after track-laying and before final completion of ballasting and surfacing, was within its legal rights under the provision of the contract allowing defendant to stop any part of the work contracted for at any time.”

XIII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"IV

Defendant was under no legal obligation to engage in common carrier transportation when it took over the first twenty-nine miles of its line from plaintiff, and was not obligated to accept log traffic to be handled thereon. The amount of log traffic accepted and transported by defendant after so taking over this portion of its railroad cannot be taken as the measure of what log traffic would have been accepted and transported if said portion of the line had remained in the control of plaintiff as contractor."

[301]

XIV.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Conclusion of Law in that such Conclusion was required by the contract between the parties, correctly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

“V

Defendant, in taking over said portion of its railroad and in conducting log transportation thereon, did not breach its contract with plaintiff, and plaintiff is not entitled to recover upon its claim for damages for alleged breach of contract in this particular.”

(Assignments XV to XXV, inclusive, relate to decision interpreting contract as to prices payable for transportation of timbers, piling, and bridge metals.)

XV.

The District Court erred in ruling that the contract between the parties entitled plaintiff to payment at the rates specified in Price Item 37 (2 cents per lineal foot per mile), Price Item 38 (85 cents per M per mile), and Price Item 39 (65 cents per ton per mile), of the contract for the haul of piling, timber and metal fastenings, respectively, which were in fact transported by rail. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusion of Law No. VI, and in the making and adoption of Finding of Fact No. XIX and Conclusions of Law Nos. II and III, respectively, and is erroneous in that the contract, correctly interpreted, makes said prices applicable to piling, timbers, and metal fasten- [302] ings hauled otherwise than by rail.

XVI.

The District Court erred in ruling that the question in dispute between the parties, as to which contract rate was applicable to the haul of piling, timber, and metal fastenings, respectively, was not a matter for submission to the chief engineer under the arbitration clause of the contract. Said ruling was made in the Court's order denying defendant's motion for the adoption of its Requested Conclusion of Law No. VII, and in making and adopting Finding of Fact No. XX, and is erroneous in that the contract, properly interpreted, made such a dispute a matter to be submitted to and decided by said chief engineer.

XVII.

The District Court erred in holding and determining that the question in dispute between the parties as to which contract rate was applicable to the haul of piling, timber, and metal fastenings, was not submitted to the chief engineer or decided by him under the arbitration clause of the contract. Said holding and determination was made in the Court's order denying defendant's motion for the adoption of its Requested Finding of Fact No. XVIII and Requested Conclusion of Law No. VII, and in making and adopting Finding of Fact No. XX and Conclusion of Law No. II, and is erroneous in that the submission of said dispute to said chief engineer and the decision thereof by him were established by uncontradicted written evidence.

XVIII.

The District Court erred in making and adopting the following Finding of Fact in that said Finding misinter- [303] preted the contract between the parties, as specified in the foregoing Assignment of Error No. XV:

“XIX

The contract fixed prices for hauling certain materials, as follows:

Hauling piles furnished by the com-	
pany per lineal foot mile.....	\$.02
Hauling timber furnished by the com-	
pany per thousand feet b.m. mile.....	.85
Hauling metal fastenings per ton mile.....	.65

These stipulations of the contract were breached by the defendant, who paid for hauling said materials at the rate specified in the contract for commercial hauling and refused to pay at the rate specified in the contract for hauling said materials. This material haul is not commercial haul and was intended to be compensated at the specified prices for material haul. The plaintiff hauled timber furnished by the defendant for which the plaintiff should have been paid \$47,253.99. The defendant has paid but \$20,410.52 of this amount, leaving unpaid and due to plaintiff on this item \$26,843.47. The plaintiff hauled piling furnished by the defendant for which the plaintiff should have been paid \$5353.78. The defendant has paid but \$660.49 of said amount, leaving unpaid and due to the plaintiff on this item

\$4693.29. The plaintiff hauled metal fastenings (bridge iron and galvanized iron) furnished by the defendant for which plaintiff should have been paid \$2563.31. The defendant has paid but \$1313.62 of this amount, leaving unpaid and due the plaintiff on this item \$1249.69."

XIX.

The District Court erred in making and adopting the following Finding of Fact in that said Finding misinterpreted the contract between the parties and the rights of the parties thereunder, as specified in the foregoing Assignments of Error Nos. XVI and XVII, respectively:

"XX

The price to be paid to the plaintiff for hauling the materials mentioned in finding XIX was not submitted to the chief engineer for decision, was [304] not a matter for submission under the contract, and refusing to pay the contract price was not pursuant to the arbitration clause of the contract, but constituted an arbitrary and coercive use of an assumed power. There is neither pleading nor proof of estoppel against or waiver by the plaintiff."

XX.

The District Court erred in adopting the following Conclusion of Law in that said Conclusion misinterpreted the contract and the rights of the parties thereunder, as specified in the foregoing Assignments of Error Nos. XV, XVI, and XVII, respectively:

“II

Defendant breached its contract by * * * refusing to pay the plaintiff the prices fixed in said contract for hauling materials furnished by the company and to be used in the construction of said railroad, * * * Upon the items affected by said several breaches plaintiff is entitled to recovery as follows:

* * * * *

For hauling materials, plaintiff is entitled to recovery as follows:

For hauling timbers.....\$26,843.47

For hauling piling..... 4,693.29

For hauling bridge metals..... 1,249.69

without interest prior
to judgment.”

XXI.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact, in that said Finding was required by the contract between the parties, the facts admitted by the pleadings, and the uncontradicted testimony: [305]

“XVIII

During the progress of the work a dispute arose between plaintiff and defendant as to whether or not the unit prices in the contract applicable to so-called team haul were applicable for all bridge materials over the newly laid track. Plaintiff hauled by rail the timber

and piles and metal fastenings described in the complaint. Defendant denied that the so-called team haul prices were applicable thereto and paid plaintiff for such hauling at the rate of \$1.00 per car mile.

The dispute between the parties was submitted to the chief engineer during the progress of the work under the provision of the contract making the chief engineer the umpire to decide such questions. Upon such submission, the chief engineer of defendant determined that the price to be paid for the transportation of said bridge materials was the rail haul price of \$1.00 per car mile."

XXII.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order making and adopting the following Requested Finding of Fact, in that said Finding was required by the contract between the parties, the facts admitted by the pleadings, and the uncontradicted testimony:

"XIX

After the chief engineer of defendant had so decided the question in dispute between the parties relating to the rate applicable to haul of bridge materials, plaintiff accepted said decision and acquiesced therein."

XXIII.

The District Court erred in denying defendant's motion, made before final submission of the cause,

for an order making and adopting the following Requested Conclusion of Law in that the contract between the parties, correctly interpreted, required such Conclusion: [308]

“VI

Plaintiff was not entitled, under the terms of its contract with defendant, to receive compensation for bridge materials hauled by rail at prices applicable to so-called team haul. The term ‘team haul’ as used in the contract meant transportation by team, truck, or by hauling on skid roads, and not transportation by rail upon the newly laid track.”

XXIV.

The District Court erred in denying defendant’s motion made before final submission of the cause, for an order adopting the following Requested Conclusion of Law in that said Conclusion was required by the contract, properly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

“VII

The dispute between the parties as to the price applicable to the hauling of bridge materials having been submitted to and decided by the chief engineer of defendant as umpire under the terms of the contract, the decision of the chief engineer is binding. There is no evidence to show that the chief engineer did not exercise an honest judgment in passing upon the dispute.”

XXV.

The District Court erred in denying defendant's motion, made before final submission of the cause, for an order adopting the following Requested Conclusion of Law, in that said Conclusion was required by the contract, properly interpreted, the facts admitted by the pleadings, and the uncontradicted testimony:

"VIII

Plaintiff is not entitled to recover upon its claim for additional compensation for the transportation of bridge materials." [307]

XXVI.

The District Court erred in making and adopting the following Finding of Fact, holding and determining that defendant breached its contract in failing to render a final estimate at the conclusion of the work, in that said holding and determination is contrary to the uncontradicted testimony:

"XXII

The contract provides that when in the opinion of the chief engineer the contract shall have been performed, he shall give a final estimate and statement of the balance unpaid, and the company within thirty days thereafter shall pay the balance due. The road was completed and turned over to the operating department of defendant December 31, 1927. Thereafter the defendant breached its contract by failing to make the final estimate required."

Wherefore defendant and appellant prays that the judgment of the District Court be **reversed**.

L. B. DA CONTE

CHARLES A. HART

CAREY, HART, SPENCER & McCULLOCH

Attorneys for Defendant
and Appellant

[Endorsed]: Filed May 18, 1937. [308]

And afterwards, to wit, on Tuesday, the 18th day of May, 1937, the same being the 59th judicial day of the Regular March, 1937, term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [309]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Defendant in the above entitled cause having filed in this Court its petition for an appeal from the final judgment herein dated February 25, 1937, accompanied by an assignment of errors and prayer for reversal,

It is hereby ordered that an appeal as prayed for in said petition be and is hereby allowed.

It is further ordered that the bond on appeal, conditioned as required by law, is hereby fixed at the sum of two hundred thousand dollars (\$200,000) and said bond shall operate as a supersedeas and

cost bond and shall stay and suspend all further proceedings in this Court until the determination of said appeal.

Dated May 18, 1937.

JAMES ALGER FEE

United States District Judge.

[Endorsed]: Filed May 18, 1937. [310]

And afterwards, to wit, on the 19th day of May, 1937, there was duly filed in said Court, a Bond on appeal in words and figures as follows, to wit:

[311]

[Title of Court and Cause.]

BOND ON APPEAL.

Know all men by these presents, that the undersigned, Northern Pacific Railway Company, a corporation, as principal, and St. Paul-Mercury Indemnity Company, a corporation, having an office in Portland, Oregon, and being duly authorized to transact business pursuant to the act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereunder", as surety, are held and firmly bound unto Twohy Brothers Company, a corporation, in the full and just sum of

Two Hundred Thousand Dollars (\$200,000)
to be paid to the said Twohy Brothers Company, a corporation, its successor or assigns; to which pay-

ment well and truly to be made the undersigned bind themselves, their successors and assigns, jointly and firmly by these presents.

Whereas, lately at a term of the District Court of the United States for the District of Oregon, in a suit pending in said Court between Twohy Brothers Company, a corporation, as plaintiff, and Northern Pacific Railway Company, a [312] corporation, a judgment was rendered against said defendant Northern Pacific Railway Company for the sum of \$170,390.58 and costs; and the said Northern Pacific Railway Company, a corporation, having obtained an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment.

Now, the condition of the above obligation is such that if the said Northern Pacific Railway Company, a corporation, shall prosecute its appeal to effect and shall pay the amount of said judgment and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

In witness whereof, the said principal and surety have executed this bond on this 18th day of May, 1937.

NORTHERN PACIFIC RAILWAY
COMPANY

By CHARLES A. HART

Its Attorneys

[Corporate Seal]

ST. PAUL-MERCURY

INDEMNITY COMPANY

By CHARLES S. BARTON

The above bond on appeal is hereby approved:

JAMES ALGER FEE,

District Judge

JEWETT, BARTON, LEAVY AND KERN

By CHARLES A. BARTON

Agents

[Endorsed]: Filed May 19, 1937. [313]

And afterwards, to wit, on the 19th day of May, 1937, there was duly filed in said Court, by plaintiff a Petition for Appeal in words and figures as follows, to wit: [314]

[Title of Court and Cause.]

PETITION FOR APPEAL TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

Now comes Twohy Brothers Company, by its attorneys, and respectfully shows that on the 25th day of February, 1937, the court found the facts and entered a final judgment in favor of petitioner-plaintiff and against defendant Northern Pacific Railway Company for the sum of \$170,390.58, and plaintiff's costs and disbursements. The said cause is one wherein plaintiff is demanding recovery from defendants for breach of a railroad construction contract, and for failure to pay moneys due under said contract; plaintiff is a corporation organized under the laws of the State of Oregon, and defend-

ant is a corporation organized under the laws of the State of Wisconsin, and the case is one in which, under the legislation in force when the act of January 31, 1928, was passed, a review could be had on writ of error.

Your petitioner feeling itself aggrieved by the said judgment entered as aforesaid herewith petitions the court for an order allowing it to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under the laws of the United States in such cases made and provided, for the reasons specified in the assignment of errors filed herewith, insofar as said judgment awards plaintiff less than the amount demanded in plaintiff's complaint. [315]

Wherefore, your petitioner prays that a writ of error do issue, that an appeal in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, that an order be made fixing the amount of security to be given by plaintiff in error, conditioned as the law directs, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to said United States Circuit Court of Appeals.

DeLANCEY C. SMITH

W. LAN THOMPSON

McCAMANT, THOMPSON, KING
& WOOD

Attorneys for Plaintiff

[Endorsed]: Filed May 19, 1937. [316]

And afterwards, to wit, on the 19th day of May, 1937, there was duly filed in said Court, by plaintiff an Assignment of Errors in words and figures as follows, to wit: [317]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS ON APPEAL.

Comes now Twohy Brothers Company, a corporation, plaintiff and appellant in the above numbered and entitled cause, and in connection with its petition for a writ of error in this cause assigns the following errors which appellant avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein, to-wit:

Assignment of Error No. I.

This specification assigns error in rejecting an invitation to bid with accompanying profiles and descriptions as representations of the amount and character of work embraced in a unit price contract executed subsequent to bidding. Plaintiff contends that where the contract specifies a price per unit, or yard, of work, for a proposed railroad through the mountains, and requires bidders to inform themselves by inspection, but does not indicate the route to be followed, information furnished with the invitation to bid as to location, amount and character of work is material and constitutes a representation upon which bidders must rely as to difficulties

and size of job, and in determining whether bidder can under- [318] take it. The only profile or description of work was that accompanying the invitation to bid.

In the year 1925 Northern Pacific Railway Company undertook the construction of a branch line of railroad into the timber of the Clearwater Timber Company, the road to extend from Orofino on the main line of the railroad company to Headquarters, a distance of 41 miles, through a rough, rugged mountain range.

Defendant let bids on a survey up the canyon of Orofino Creek made for the timber company by one Chamberlin, admittedly a competent locating engineer. On September 18, 1925, an invitation to bid was mailed by defendant in St. Paul, Minnesota, to plaintiff at Seattle, Washington, accompanied by profiles of the Chamberlin survey, showing 71 bridges over Orofino Creek and confluent creeks, and approximately 20 changes of the Orofino Creek channel. The profile contained all of the information of a final location, showing grade, curvature, and amount and classes of material to be moved; also with the invitation went a detailed description of the line shown on the profiles. Blank forms for filling in the bidder's price for all work on a unit basis accompanied the invitation, which advised bidders that there was a time limit for the work as the road was required to be ready to move logs for the Clearwater Timber Company by June 1, 1927. Plaintiff's bid was accepted and construc-

tion of the railroad was begun a month before the formal contract was signed. The contract which was drawn by defendant names the termini but does not designate the route of the proposed line, and is on a unit basis.

Plaintiff, in determining whether to bid, and in preparing and submitting its bid, relied upon the Chamberlin profile and data submitted by defendant. Defendant in computing the totals of the several bids for comparison used the [319] amounts of the several classes of materials shown on the Chamberlin profile, and furnished plaintiff a large number of blueprints of said profile for use in letting subcontracts and dividing the work between subcontractors. The chief engineer of defendant approved the subcontracts. The field engineer had only the Chamberlin profile when he arrived at the work, began cross-sectioning the line shown on that profile, and actual construction was begun by plaintiff under defendant's direction on that profile.

As the work progressed, 21 bridges were eliminated by defendant, and 22 new changes of the channel of Orofino Creek were made, embankment in the old creek bed replacing bridges; the job shown on the Chamberlin profile was to move 1,078,000 cubic yards of material, whereas in the actual job 2,057,575 cubic yards was moved.

When plaintiff offered the letter of invitation to bid above mentioned, defendant offered the following objection thereto:

“The defendant objects to the admission of the proposed document. It appears to be a letter from the chief engineer of the defendant railway company to Twohy Brothers dated September 18, 1925, approximately a month before the execution of the contract. This is immaterial and not competent in support of any issue in this case.”

When plaintiff offered the Chamberlin profile above mentioned, defendant offered the same objection which it had offered to the letter of invitation above mentioned.

When plaintiff offered the description of the proposed railroad line furnished by defendant to bidders, defendant objected thereto for the same reason stated in objecting to the above mentioned letter of invitation to bid, and the additional reason that

“It is an attempt to vary the terms of the written contract thereafter made.” [320]

In putting in its own case in defense, defendant called as a witness its chief engineer, who testified without objection that the defendant took bids on the Chamberlin profile, that defendant sent out the invitation to bid which had been offered in evidence by plaintiff, and thereafter, and before bids were submitted, defendant sent to plaintiff supplemental letters and information modifying some of the information which accompanied the invitation letter.

The court qualifiedly sustained the objections to plaintiff's offers of the letter of invitation, the

Chamberlin profile and the description of the proposed line; that is, the offers were rejected as representations of the line or grade of the railroad, or the amount or character of the work to be performed under the contract; the court limited said evidence to establishing the general course of the projected road to be through the canyon of Orrfino Creek and rejected it for all other purposes.

Exception to the rejection and limitation of said evidence was taken as follows:

“Plaintiff excepts to the rejection of the evidence of the so-called Chamberlin survey and estimates as representations of the amount and character of work to be done by contractor.”

Appropriate and timely requests were made by plaintiff for special findings with respect of these original representations.

Assignment of Error No. II.

This specification assigns error in construing plaintiff's pleadings as not presenting the issue of extension of time to complete the construction contract beyond the finishing date named herein (September 1, 1927) and therefore limiting plaintiff's recovery for wrongful deprivation of log haul to logs [321] hauled prior to that date. Plaintiff contends that its complaint avers all facts necessary to plead (1) a waiver of the time limit, and (2) affirmatively pleads an extension of time for completion (Complaint, pars. VI, VII-VIII, IX, XI, XX; reply to par. V).

In September 1925 defendant mailed to plaintiff and other contractors an invitation to bid on construction of a branch line of railroad from Orofino to Headquarters in the state of Idaho. The road was to traverse a rough mountain range. With the invitation went a profile of final location of the line up the canyon of Orofino Creek, a detailed description of the line, and blank forms to be filled in with prices for each unit of work. The information thus submitted showed 71 bridges, 22 changes of the channel of Orofino Creek, and a total of 1,078,000 cubic yards of material to be moved in 41 miles of construction. It warned against cutting into the points of land at stream curvature to avoid bridge construction, as that would produce immense yardage in the steep canyon sides. Plaintiff based its bid on this information; defendant used this information in computing the several bids; the field engineer, and plaintiff, whose bid was accepted, began work on the profile submitted with the invitation.

The invitation to bid required rail to be laid by June 1, 1927, to move logs for the Clearwater Timber Company; the contract fixed the same date, with September 1, 1927, the date for completing the finishing work on the road. The contract was signed by plaintiff November 18, 1925.

As required by the contract, the subcontracts were submitted to and approved by defendant's chief engineer, and the entire work was divided between various subcontractors. The subcontracts

provided for completion of grading at various [322] dates ranging from July 15, 1926, for the first 15 miles out of Orofino, to October 1, 1926, for the upper end of the line at Headquarters.

The canyon of Orofino Creek is very rough, and the first 15 miles out of Orofino was important because it would be the means of transporting materials to the canyon. The data accompanying the invitation to bid indicated that 352,425 cubic yards of material would have to be moved in this first sector; final estimate was 635,842 cubic yards. Early in the work the engineer knew the yardage would overrun materially, but did not give definite advice thereof to plaintiff. Instead, the increase was permitted to develop gradually. By June 30, 1926, 355,000 cubic yards of material had been moved on the first sector. The work then continued on this part of the road until the year end, delaying other work.

Many changes were made by the engineer from that indicated on the profile on which bids were based. A tunnel was changed to open cut; 22 new and additional changes in the creek channel were made; 21 bridges eliminated and embankment substituted therefor; work was shifted from one side of the creek to the other; heavy rock work was required where team work was indicated; and a wide grade surface was developed in places by shifting the center line, at one point the width exceeding 100 feet. At some of the steep canyon banks a shift of line as much as one foot could increase the

yardage one thousand per cent. Some of the shifts cut into the canyon bank as much as 55 feet. Whereas the profile submitted with the invitation to bid indicated a job of moving 1,078,000 cubic yards of material, the plaintiff was required to move 2,057,575 cubic yards. [323]

Plaintiff had a feasible plan to complete, and would have completed, the work on time, which was submitted to and approved by defendant before work began. It was based on the work indicated on the profile submitted with the invitation to bid, and contemplated that all grading would be completed by October 1, 1926, most of it during the summer of 1926. By October 1, 1926, plaintiff had moved 1,300,000 cubic yards of material. Much of the balance of the total yardage had to be moved in the winter of 1926-1927 under very difficult weather conditions. New channel changes of difficult nature contributed largely to the delay. Some of them were on the first 15 miles, and with the large increase in yardage on that sector delayed the entire work. At request of defendant, plaintiff began work immediately on acceptance of its bid October 15, 1925, and had been pursuing the work on the profile submitted with the invitation for a month before the formal contract was presented and signed.

Defendant directed construction of a number of bridges from rail end. This could not be done until the lower end of the road was completed. Under direction of defendant mud blocks were set in the

bed of Orofino Creek during the summer of 1926; thereafter the work of erecting bents was necessarily performed in the winter of 1926-1927 under conditions of almost indescribable difficulty.

Plaintiff's performance of the contract was delayed in the beginning by failure of the defendant to have trackage facilities at Orofino, and to have camps for its resident engineers. All were constructed by plaintiff; also defendant had not acquired rights of way, and plaintiff had to shift work from place to place during early construction. [324]

In July 1927 defendant ordered work to stop on the lower portion of the road (which defendant took over and completed, wrongfully, we think) but directed plaintiff to "proceed with the completion of the contract work north of Jaype siding". A like notice to stop work on an additional sector above Jaype was given October 7, 1927, and again plaintiff was directed to continue the contract work on the remainder of the line.

The contract required plaintiff to conduct all commercial hauling during construction and until the road was turned over to the operating department of the defendant. The Clearwater Timber Company had cut and banked along the right of way upwards of 20,000,000 f.b.m. of logs prior to July 1927 which had to be moved before another winter to avoid heavy damage. At the contract price of \$1.00 per car mile for moving these logs, they were an important commercial haul item, and

plaintiff prepared to haul them and did haul some of them before July 16, 1927. On that date defendant took that portion of the road on which rails were laid, extending from Orofino to Jaype (but on which finishing work was not completed) in order to get this traffic and deprive plaintiff of the profits thereof. With the same motive, additional portions of the road were taken October 12, 1927, and the entire road was taken October 25, 1927. The portions of the road thus taken piecemeal were operated and the logs handled by the construction department of defendant. No portion of the road was turned over to the operating department of defendant until December 31, 1927.

Appropriate and timely requests were made by plaintiff for special findings that performance of the contract was delayed by defendant and the time for completion extended accordingly. [325] These requests were refused. The court properly found plaintiff was entitled to conduct the log haul, that the taking by defendant was wrongful, and that plaintiff was entitled to recover the profits of which it was thereby deprived, but the court further found "that plaintiff's pleadings do not present the issue of defendant's conduct extending the time to complete the contract beyond September 1, 1927," and limited plaintiff's recovery to the logs hauled up to September 1, 1927, denying recovery for the period between September 1, 1927, and October 25, 1927, and for the period between October 25, 1927, and December 31, 1927.

Assignment of Error No. III.

This specification assigns error in refusing to allow interest on the award against defendant for wrongfully taking from plaintiff the commercial or log haul during construction. Plaintiff contends that where a construction contract requires defendant to submit a final estimate on completion and pay the full balance due within thirty days thereafter, this fixes the date from which interest will accrue on money wrongfully withheld; that a wrongful taking of commercial haul from the contractor under misconstruction of the contract can not relieve defendant of the duty to rightly construe and pay under the contract; that where the amount of this commercial haul is known to defendant and the total is merely a matter of computation, the full amount thereof is due at the time named in the contract and interest will accrue thereon from the due date under both the state statute and the federal rule, whether treated as interest or damages for delay, subject to the right in defendant to have the principal amount reduced as of the due date by the amount it would have cost plaintiff to conduct the log haul. [326]

The contract provides that when it shall have been performed, the chief engineer shall so certify in writing and give a final estimate and statement of the balance unpaid, "and the company within thirty days thereafter will pay the full balance."

The contract further provides that "in case of a total suspension of all work for over ninety days, without any fault or procurement of the contractor

* * * the chief engineer shall make a final estimate and the amount so estimated shall be paid to the contractor”.

Defendant, through its construction department, took the entire road from plaintiff on October 25, 1927. The road was not accepted and turned over to the operating department of defendant until December 31, 1927.

Plaintiff made timely and appropriate request that interest be allowed on the award for the log haul dating from February 1, 1928. This was refused, and the court refused to allow interest on the award prior to judgment.

Assignment of Error No. IV.

This specification assigns error in refusing to allow interest from the date specified in the contract when all moneys should be due and payable to the contractor, the interest being claimed with respect of underpayments for hauling bridge materials, for which work a specific price is named in the contract. Defendant wrongfully construed the contract as calling for a price less than specified. No question of the amount of such hauling is involved. Plaintiff contends (1) that this cause of action is a simple claim for money not paid when due by the contract, and (2) if construed as an action [327] for breach of contract it nevertheless would be for breach of contract to pay money on a specified date; that on either construction interest should be awarded from the due date under both the state statute and the federal rule.

The contract fixes unit prices for all work, among them being

Hauling piles furnished by the company,	
per lineal foot mile.....	\$.02
Hauling timber furnished by the company,	
per thousand feet b.m. mile.....	.85
Hauling metal fastenings, per ton mile.....	.65

The court properly found that plaintiff hauled piles furnished by the company, for which, at the stipulated rate, \$5,353.78 should have been paid, of which only \$660.49 had been paid; timber furnished by the company, for which, at the stipulated rate, \$47,253.99 should have been paid, of which only \$20,410.52 had been paid; and metal fastenings, for which, at the stipulated rate, \$2,563.31 should have been paid, of which only \$1,313.62 had been paid; and gave judgment accordingly, but refused to allow interest prior to judgment.

The contract provides that when it shall have been performed the chief engineer shall so certify in writing and give a final estimate and statement of the balance unpaid, "and the company within thirty days thereafter will pay the full balance."

The contract further provides that "in case of a total suspension of all work for over ninety days, without any fault or procurement of the contractor * * * the chief engineer shall make a final estimate and the amount so estimated shall be paid to the contractor". [328]

Defendant through its construction department took the entire road from plaintiff October 25, 1927.

The road was not accepted and turned over to the operating department of defendant until December 31, 1927.

Timely and appropriate requests were made for interest on the award.

Wherefore appellant prays that the judgment of said District Court of the United States for the District of Oregon be reversed insofar as it refused to award judgment as prayed in plaintiff's complaint.

DELANCEY C. SMITH

W. LAIR THOMPSON

McCAMANT, THOMPSON, KING
& WOOD

Attorneys for Plaintiff

[Endorsed]: Filed May 19, 1937. [329]

And afterwards, to wit, on Wednesday, the 19th day of May, 1937, the same being the 60th judicial day of the Regular March, 1937, term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [330]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND
FIXING BOND

Plaintiff in the above entitled cause having filed in this court a petition for an appeal from the final judgment entered herein dated February 25, 1937,

together with an assignment of errors and prayer for reversal, it is hereby

Ordered that an appeal as prayed for in said petition be and it is hereby allowed; the bond on appeal conditioned as required by law is hereby fixed at the sum of \$250.00 and said bond shall operate as a cost bond.

Dated this 19th day of May 1937.

JAMES ALGER FEE
United States District Judge

[Endorsed]: Filed May 19, 1937. [331]

And afterwards, to wit, on the 20th day of May, 1937, there was duly filed in said Court, a bond on appeal of plaintiff in words and figures as follows, to wit: [332]

United States Circuit Court of Appeals
for the Ninth District

TWOHY BROTHERS COMPANY,
a Corporation,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellee.

BOND ON APPEAL

Know all men by these presents that we, Twohy Brothers Company, a corporation, as principal, and

Hartford Accident and Indemnity Company, a corporation, as surety, are held and firmly bound unto the appellee, Northern Pacific Railway Company, a corporation, in the full and just sum of two hundred and fifty (\$250.00) dollars to be paid to the said appellee, Northern Pacific Railway Company, its certain attorneys, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 20th day of May A. D. 1937.

Whereas in the District Court of the United States for the District of Oregon in an action pending in the said court between Twohy Brothers Company, a corporation, plaintiff, and Northern Pacific Railway Company, a corporation, defendant, a judgment was rendered against the said Northern Pacific Railway Company, and the said Twohy Brothers Company having obtained the allowance of an appeal and filed a copy [333] thereof in the clerk's office of the said court to reverse the judgment in the aforesaid action and a citation directed to the said Northern Pacific Railway Company citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, State of California in said circuit on the 15th day of June, 1937.

Now the condition of the above obligation is such that if the said appellant shall prosecute its appeal to effect and answer all costs if he fail to make

the said plea good, then the above obligation to be void, else to remain in full force and virtue.

TWOHY BROTHERS COMPANY

By McCAMANT, THOMPSON, KING & WOOD

Principal.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY

By CHARLES S. BARTON

Attorney in Fact Surety

Countersigned:

JEWETT, BARTON, LEAVY AND KERN

By CHARLES S. BARTON

Agents.

The above bond is approved May 20, 1937.

JAMES ALGER FEE

District Court Judge.

[Endorsed]: Filed May 20, 1937. [334]

And afterwards, to wit, on the 21st day of May, 1937, there was duly filed in said Court, a stipulation for record on appeal, in words and figures as follows, to wit: [335]

[Title of Court and Cause.]

STIPULATION FOR PREPARATION OF
TRANSCRIPT OF RECORD

Whereas, defendant has filed herein a petition for an appeal and an order has been made allowing defendant an appeal, and citation has been issued thereon, and

Whereas, plaintiff has also filed a petition for an appeal and an order has been made allowing such appeal and a citation has been issued thereon, and plaintiff has thereby become cross-appellant herein;

The parties stipulate that but one transcript of record shall serve both appellant and cross-appellant herein, and but one transcript of record shall be printed, which said transcript of record shall include the documents below listed; and the Clerk of this Court is hereby requested to prepare, certify, and transmit to and file in the United States Circuit Court of Appeals for the Ninth Circuit a transcript of record in this cause to include the following:

1. Complaint
2. Process and Return
3. Answer
4. Reply [336]
5. Stipulation waiving jury trial
6. Defendant's Bill of Exceptions
7. Plaintiff's Bill of Exceptions
8. Findings and Conclusions signed by the Court and filed February 25, 1937
9. Judgment
10. Defendant's Petition for Appeal
11. Defendant's Assignment of Errors
12. Order allowing defendant's appeal and fixing amount of bond
13. Citation on defendant's appeal with admission of service
14. Bond on defendant's appeal
15. Plaintiff's Petition for Appeal

16. Plaintiff's Assignment of Errors
17. Order allowing plaintiff's appeal and fixing amount of bond
18. Citation on plaintiff's appeal with admission of service
19. Bond on plaintiff's appeal
20. This Stipulation for Preparation of Transcript of Record

Dated this 21st day of May, 1937.

DELANCEY C. SMITH

W. LAIR THOMPSON

McCAMANT, THOMPSON, KING & WOOD

Attorneys for Plaintiff

L. B. DA PONTE

CHARLES A. HART

CAREY, HART, SPENCER & McCULLOCH

Attorneys for Defendant

[Endorsed]: Filed May 21, 1937. [337]

United States of America

District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 5 to 337 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein No. L-10552, in which Twohy Brothers Company, a corporation, is plaintiff, and the Northern Pacific Railway Company, a corporation, is defendant, and in which case the

Northern Pacific Railway Company is appellant upon an appeal taken by it, and Twohy Brothers Company is appellee upon said appeal, and in which case the said Twohy Brothers Company is appellant upon an appeal taken by it, and the said Northern Pacific Railway Company is appellee upon said appeal; that said transcript of record has been prepared by me in accordance with a stipulation for transcript filed by appellants and appellees; that I have compared the foregoing transcript with the original record thereof, and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said stipulation as the same appear of record and on file at my office and in my custody.

I further certify that the appellant, the Northern Pacific Railway Company has paid as its portion of the cost of the foregoing transcript the sum of \$42.05 and that appellant, Twohy Brothers Company have paid the balance of the cost of said transcript amount of \$12.55.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 8th day of July, 1937.

[Seal]

G. H. MARSH,

Clerk [338]

[Endorsed]: No. 8594. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a corporation, Appellant and Cross-Appellee, vs. Twohy Brothers Company, a corporation, Appellee and Cross-Appellant. Transcript of Record. Upon Appeal and Cross-Appeal from the District Court of the United States for the District of Oregon.

Filed July 10, 1937.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

